

APPENDIX S

IMPLEMENTATION AGREEMENT WITH REGARD TO THE PACIFIC LUMBER COMPANY HABITAT CONSERVATION PLAN

PUBLIC REVIEW DRAFT

IMPLEMENTATION AGREEMENT

WITH REGARD TO

**THE PACIFIC LUMBER COMPANY
HABITAT CONSERVATION PLAN**

By And Among

THE UNITED STATES FISH AND WILDLIFE SERVICE

THE NATIONAL MARINE FISHERIES SERVICE

THE CALIFORNIA DEPARTMENT OF FISH AND GAME

THE CALIFORNIA DEPARTMENT OF FORESTRY

and

**THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY, AND
SALMON CREEK CORPORATION**

_____, 1999

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LIST OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>
A	List of Covered Species
B	Form of Streambed Alteration Agreement
C	15 Code of Federal Regulations Part 904
D	UNFORESEEN CIRCUMSTANCES REGULATIONS: 50 C.F.R. SECTION 17.3, 50 C.F.R. SECTION 17.22(B)(5)(III)(B), 50 C.F.R. SECTION 17.32(B)(50(III)(B), 50 C.F.R. SECTION 222.3 AND 222.22(G)(3) (1999)
E	Regulations for Implementation of California Endangered Species Act: California Code of Regulations, title 14, section 783.0, et seq.
F	AB 1986

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PALCO HABITAT CONSERVATION PLAN
IMPLEMENTATION AGREEMENT

This AGREEMENT REGARDING THE IMPLEMENTATION OF THE PALCO HABITAT CONSERVATION PLAN ("Agreement") is entered into as of the Effective Date by and among the UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), an agency of the United States Department of the Interior, the NATIONAL MARINE FISHERIES SERVICE ("NMFS"), an agency of the United States Department of Commerce, the CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG"), an agency of the State of California, the CALIFORNIA DEPARTMENT OF FORESTRY ("CDF"), an agency of the State of California, and THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY and SALMON CREEK CORPORATION (collectively, "PALCO").

These entities may be referred to collectively as "Parties" and each individually as a "Party." USFWS and NMFS may be referred to collectively as the "Services," and each individually as a "Service." USFWS, NMFS and CDFG may be referred to collectively as the "Wildlife Agencies," and each as a "Wildlife Agency." The Wildlife Agencies and CDF are referred to collectively as the "Agencies." (Additional defined terms are set forth in the "Recitals and Purposes" portion of this Agreement and in Section 1 of this Agreement.)

Recitals and Purposes

- A. PALCO owns approximately 211,000 acres within Humboldt County, California (the "PALCO Lands"). PALCO is in the process of acquiring and is planning to acquire certain additional lands near or adjacent to the PALCO Lands (the "Additional Lands"; the PALCO Lands and Additional Lands are referred to collectively herein as the "Covered Lands"). The Covered Lands fall within several major watersheds in Humboldt County, California. Certain portions of these watersheds form the Plan Area for this Agreement (the "Plan Area"). The Plan Area is depicted on Map No. 2 in Volume V of the Draft SYP/HCP; see also HCP, Attachments, Volume II, Part B: PALCO Ownership by Assessor Parcels.
- B. In September 1996, the United States and the State of California, acting through its Secretary of Resources, entered into an agreement providing for the sale of the Headwaters Reserve to the United States and State of California and establishing certain conditions on such sale including, but not limited to, the approval of a habitat conservation plan (HCP) and issuance of associated incidental take permits by USFWS and NMFS, and the approval of a sustained yield plan by the CDF, all with regard to timber harvesting and related activities on the Covered Lands.
- C. The Covered Lands have been determined to possess habitat values which are important to the conservation and recovery of certain threatened, endangered, and other species of concern.
- D. USFWS and NMFS have jurisdiction over the conservation, protection, restoration, enhancement, and management of fish, wildlife, native plants and their habitats under various federal laws, including the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("FESA"), the Fish and Wildlife Coordination Act, 16 U.S.C. § 661-666c, and the Fish and Wildlife Act of 1956, 16 U.S.C. § 742a *et seq.*
- E. CDF has jurisdiction over the timberlands of the State of California as set forth in the Forest Practice Act, the California Timberland Productivity Act of 1982, and the implementing regulations for those statutes.
- F. CDFG has jurisdiction over the conservation, protection, restoration, enhancement, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable

populations of those species under the California Endangered Species Act (California Fish and Game Code §2050 *et seq.*, “CESA”), and other State law including but not limited to the Native Plant Protection Act (California Fish and Game Code § 1900 *et seq.*) and California Fish and Game Code sections §1600 *et seq.*, 3503.5 and 3511. In addition, pursuant to Section 1802 of the California Fish and Game Code, CDFG is trustee for fish and wildlife resources.

- G. PALCO desires to use the Covered Lands, including, upon their acquisition by PALCO, the Additional Lands, for the Covered Activities, including activities relating to timber production and harvesting, road construction and maintenance, rock quarrying, and rock extraction from borrow pits, and the Operating Conservation Program activities, as particularly described at Section C.4 of the HCP attached as Appendix P to the FEIS/EIR for the Headwaters Forest Project. (the “FEIS/EIR”).
- H. FESA prohibits the “Take” of species listed as endangered or threatened under FESA. Under Section 10(a) of FESA (16 U.S.C. section 1539(a)), the Services may issue an incidental take permit authorizing the Take of endangered or threatened species incidental to the carrying out of otherwise lawful activities if certain statutory requirements are met by the applicant and such Take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. To obtain an incidental take permit, the applicant must submit a habitat conservation plan describing, among other things, the steps the applicant will take to minimize and mitigate to the maximum extent practicable the impact of such taking.
- I. CESA prohibits the “Take” of species listed as endangered, threatened or candidate species under CESA. CESA authorizes the take of listed species incidental to otherwise lawful activities if the impacts of the Take are minimized and fully mitigated, if issuance of the permit would not jeopardize the continued existence of the species, and the permit applicant has ensured adequate funding to implement the measures required to ensure the impacts of the authorized take are minimized and fully mitigated and for monitoring compliance with and the effectiveness of those measures. The measures required to minimize and fully mitigate the impacts of the Take are required to be “roughly proportional in extent to the impact of the authorized take.” Where various measures are available to meet this obligation, the measures required shall maintain the applicant’s objectives “to the greatest extent possible.”
- J. The Covered Activities may result in the Take of species listed as threatened or endangered under FESA and threatened or endangered, or a candidate for such status, under CESA. In order to obtain permits to allow the Incidental Take of these species under section 10(a)(1)(B) of FESA, PALCO has developed and set forth in the HCP a series of measures to minimize and mitigate to the maximum extent practicable the effects of Take incidental to PALCO’s Covered Activities. In order to obtain a permit under Section 2081(b) of the California Fish and Game Code for Incidental Take of these species under CESA, PALCO has developed and set forth in the HCP a series of measures to minimize and fully mitigate the effects of Take incidental to PALCO’s Covered Activities.
- K. The purposes of this Agreement are (1) to ensure implementation of each of the terms of the HCP; (2) to describe remedies and recourse should any party fail to perform its obligations as set forth in the HCP and this Agreement; and (3) to provide long term assurances to PALCO that as long as the terms of the HCP, the Federal Permit, the State Permit and this Agreement are fully performed, no additional conservation or mitigation will be required of PALCO to minimize and mitigate the impacts of Take of the Covered Species on the Covered Lands except as provided in the HCP and this Agreement or required by law.
- L. PALCO is agreeing to substantial commitments of land, natural resources, money and other property for the conservation of the Covered Species and their habitats, and is agreeing to other

substantial restrictions on the use of the Covered Lands based on the assurances provided by the Agencies in this Agreement. These commitments would not have been made by PALCO but for the assurances of the Agencies provided in the HCP and this Agreement.

Agreement

For good and valuable consideration, the receipt and adequacy of which are acknowledged, the Parties agree as follows:

1. DEFINITIONS

“Adaptive Management” means a flexible, iterative approach to long-term management of biotic resources and achievement of the HCP’s biological objectives that is directed over time by the results of on-going monitoring activities, changed conditions and new information. Biological management techniques and specific objectives are regularly evaluated in light of monitoring results and other new information. These evaluations are used over time to adapt both the management directives and techniques to better achieve the HCP’s overall biological objectives.

“Additional Lands” means those areas within the Plan Area which are not owned by PALCO as of the Effective Date but which will become Covered Lands to which the Wildlife Agencies will apply the Take authority granted by the Wildlife Agencies to PALCO pursuant to the HCP and this Agreement once PALCO acquires such lands, or the right to use such lands for Covered Activities, in accordance with Sections 5.1 and 5.2 of this Agreement. The Additional Lands are depicted on Map No. 4 in Volume V of the Draft SYP/HCP.

“Agreement” means this Agreement Regarding the Implementation of the PALCO Habitat Conservation Plan by and among USFWS, NMFS, CDFG, CDF and PALCO.

“Annual Report” shall have the meaning set forth in section 3.4.2 of this Agreement.

“Aquatics Conservation Plan” means that component of the HCP’s Operating Conservation Program ” found at Section F.3 of the HCP attached as Appendix P to the FEIS/EIR.

“Assurances Rule” means the regulations promulgated jointly by the USFWS and NMFS at 50 C.F.R. §17.3, 50 C.F.R. §17.22(b)(5)(iii)(B), 50 C.F.R. § 17.32(b)(5)(iii)(B), and 50 C.F.R. §§222.3 and 222.22(g)(3) as of the Effective Date, and attached as Exhibit “D” hereto.

“Birds of Prey” means any birds in the orders Falconiformes or Strigiformes.

“BGEPA” means the Bald and Golden Eagle Protection Act (16 U.S.C. § 668-668d).

“CDF” means the California Department of Forestry, or any successor agency thereof.

“CDFG” means the California Department of Fish and Game, or any successor agency thereof.

“CEQA” means the California Environmental Quality Act (Cal. Pub. Resources Code section 21000 *et seq.*).

“CESA” means the California Endangered Species Act (Cal. Fish & Game Code section 2050 *et seq.*).

“Changed Circumstance Notice” means the notice concerning the conservation and mitigation measures or other planned response to a Changed Circumstance to be provided by USFWS, NMFS, and/or CDFG, as applicable, pursuant to section 6.1.6.4.2 and 6.2.3.2 of this Agreement.

“Changed Circumstances” means those changes in circumstances affecting a Covered Species or the Plan Area as specifically provided for pursuant to Attachment No. 4 to Section K of the HCP.

“Conservation and mitigation” and **“conservation or mitigation”** means the commitment of land, water, and financial compensation, and restrictions on the use of land, water or other natural resources.

“Conserved Habitat Areas” means the MMCAs.

“Covered Activities” means the following activities described in Section C.4 of the HCP attached as Appendix P to the FEIS/EIR: (a) all activities relating to timber management, including timber harvest, site preparation, tree planting, vegetation management (with the exception of forest chemicals, i.e. herbicide, pesticide, and fertilizer use), thinning, and fire suppression; (b) rock extraction from borrow pits for a period of five years from the Effective Date; (c) road construction, improvement, maintenance and use; (d) scientific surveys and studies; (e) rock quarrying from PALCO’s two commercial rock quarries for a period of two years from the Effective Date (f) all activities included within the Operating Conservation Program; and (g) with the exceptions noted above, all activities necessarily incident to such activities. These activities are further described in Section C.4 of the HCP.

“Covered Lands” means the lands upon which the Federal Permit and State Permit authorize Incidental Take of Covered Species and the lands to which the Operating Conservation Program applies, including, upon their acquisition, the Additional Lands. These lands are depicted on Map Nos. 2 and 4 in Volume V of the draft SYP/HCP. Incidental Take authorization for Additional Lands will become effective only in accordance with Section 5.2 of this Agreement.

“Covered Species” means the Species for which Incidental Take authority for Covered Activities is being granted by the Wildlife Agencies to PALCO pursuant to the Federal Permit and the State Permit. Covered Species include the Federal Listed Species, the State Listed Species, and the Other Species of Concern. The list of Covered Species is attached as Exhibit “A.”

“Effective Date” means the date following execution of this Agreement by all Parties on which the Federal Permit and the State Permit take effect as to authorize the Incidental Take of Covered Species by PALCO pursuant to the Covered Activities.

“Federal Listed Species” means the Covered Species which are listed as threatened or endangered species under FESA as of the Effective Date, and the Covered Species which are listed as threatened or endangered pursuant to FESA during the term of the HCP, as of the date of such listing.

“Federal Permit” means, collectively, the permit issued by USFWS and the permit issued by NMFS pursuant to section 10(a) of FESA to permit Incidental Take of Covered Species which may occur as a result of Covered Activities by PALCO on the Covered Lands. Depending on the context in which the term is used in the text of this Agreement, “Federal Permit” may also mean the individual permit issued by USFWS or the individual permit issued by NMFS.

“FESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C. §1531 *et seq.*).

“Forest Practice Act” means the Z’berg-Nejedly Forest Practice Act of 1973 (Cal. Pub. Resources Code, § 4511 *et seq.*).

“Fully Protected Species” means any Covered Species found at California Fish and Game Code sections 3511 or any successor statutes.

“HCP” means the PALCO Habitat Conservation Plan included in the FEIS/EIR for the Headwaters Forest Project, and in particular Appendix P of the FEIS/EIR.

“Incidental Take” means the Take of a Species which is incidental to an otherwise lawful activity.

“MBTA” means the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§703-712).

“MMCA” mean the Marbled Murrelet Conservation Areas. The MMCA are those areas identified in Section 3.1.1 of this Agreement and depicted on Map A, section L.4 of the HCP in which the Covered Activities are restricted, pursuant to section 3.1.1. of this Agreement, to MMCA Conservation Activities.

“MMCA Conservation Activities” means those activities, specifically listed at section 3.1.1. of this Agreement and Section F.1 of the HCP, which PALCO may conduct in the MMCA.

“Murrelet Recovery Plan” means the most recent recovery plan in existence for the marbled murrelet (*Brachyramphus marmoratus*), and approved by USFWS in accordance with FESA.

“NCCP Plan” means a plan for the conservation and management of species approved by CDFG pursuant to the California Fish and Game Code §§2800 *et seq.*

“NEPA” means the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*).

“NMFS” means the National Marine Fisheries Service, or any successor agency thereto.

“Operating Conservation Program” means the conservation and management measures, provided under the HCP to minimize, mitigate and monitor the impacts of Take of the Covered Species as described in Section F of the HCP attached as Appendix P to the FEIS/EIR and this Agreement. The Operating Conservation Program’s conservation and management measures include PALCO’s reporting obligations under the Federal Permit and State Permit and those measures described at Attachment 4 to Section K of the HCP to respond to Changed Circumstances.

“Other Species of Concern” means those Covered Species which are not Federal Listed Species and are not State Listed Species.

“PALCO” means, collectively, The Pacific Lumber Company, Scotia Pacific Holding Company and Salmon Creek Corporation (or the specifically-identified subsidiaries of The Pacific Lumber Company existing on the Effective Date owning Covered Land and/or engaging in Covered Activities on the Covered Land, and signatory to the Agreement), their officers, directors, employees, and agents.

“PALCO Lands” means those lands owned by PALCO as of the Effective Date within the Plan Area. Those lands comprise approximately 211,000 acres and are depicted on Map No. 2, Volume V of the Draft SYP/HCP.

“Party” shall have the meaning set forth in the introductory paragraph of this Agreement.

“Plan Area” means the area depicted on Map No. 2, Volume V of the Draft SYP/HCP.

“Species” shall have the meaning ascribed to such term in FESA and its implementing regulations.

“State Listed Species” means the Covered Species which are listed as threatened or endangered species, or a candidate for such status, under CESA, as of the Effective Date, and the Covered Species which are listed as threatened or endangered, or a candidate for such status pursuant to CESA during the term of the HCP, as of the date of such listing.

“State Permit” means the permit issued by CDFG pursuant to section 2081 of the California Fish and Game Code.

“Streambed Alteration Agreement” means that certain Streambed Alteration Agreement, dated the Effective Date, by and between CDFG and PALCO, a form of which is attached as Exhibit “B” and incorporated into the HCP.

“SYP” means the Sustained Yield Plan submitted by PALCO to CDF in accordance with the Forest Practice Act and the implementing regulations thereof.

“Take” and **“Taking”** have the same meaning as provided in FESA and its implementing regulations with regard to activities subject to FESA, and have the same meaning as provided in California state law with regard to activities subject to CESA and other applicable provisions of the California Fish and Game Code.

“Unforeseen Circumstances” means changes in circumstances affecting a Covered Species or the Plan Area that could not reasonably have been anticipated by PALCO, NMFS, USFWS and CDFG at the time of the HCP's negotiation and development and that result in a substantial and adverse change in the status of one or more of the Covered Species.

“USFWS” means the United States Fish and Wildlife Service, or any successor agency thereto.

“Wildlife Agency” shall have the meaning set forth in the Introductory Paragraph of this Agreement.

2. FINDINGS AND OBLIGATIONS OF THE AGENCIES

2.1 USFWS

2.1.1 USFWS Findings

For each Covered Species which is a Federal Listed Species within the jurisdiction of the USFWS, USFWS finds that the HCP has satisfied the permit issuance criteria under section 10(a)(2)(B) of FESA in that:

- the Taking of the Covered Species will be incidental;
- PALCO will, to the maximum extent practicable, minimize and mitigate the impacts of the Taking;
- PALCO has ensured that adequate funding for the HCP will be provided;
- the Taking of the Covered Species will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild;
- the other measures required by USFWS as being necessary or appropriate for purposes of the HCP will be met; and

USFWS has received such other assurances as USFWS required that the HCP will be implemented.

For each Covered Species which is not a Federal Listed Species, USFWS finds that the HCP has satisfied the permit issuance criteria under section 10(a)(2)(B) of the FESA that would otherwise apply if such Covered Species were a Federal Listed Species.

2.1.2 USFWS Obligations

Concurrent with the execution of this Agreement by all Parties, and on satisfaction of all other applicable legal requirements, USFWS will issue to PALCO the Federal Permit under Section 10(a)(1)(B) of the FESA, authorizing the Incidental Take by PALCO of each Covered Species within the jurisdiction of USFWS resulting from Covered Activities on the Covered Lands. The Federal

Permit will be conditioned on compliance with the terms and conditions of the Federal Permit, the HCP, and this Agreement.

USFWS shall monitor PALCO's implementation of the HCP and compliance with the Federal Permit, and shall provide technical assistance to PALCO regarding implementation of the HCP throughout the duration of the Federal Permit.

2.2 NMFS

2.2.1 NMFS Findings

For each Covered Species within the jurisdiction of NMFS which is a Federal Listed Species, NMFS finds that the HCP has satisfied the permit issuance criteria under section 10(a)(2)(B) of FESA in that:

- (i) the Taking of the Covered Species will be incidental;
- (ii) PALCO will, to the maximum extent practicable, minimize and mitigate the impacts of the Taking;
- (iii) PALCO has ensured that adequate funding for the HCP will be provided;
- (iv) the Taking of the Covered Species will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild;
- (v) the other measures required by NMFS as being necessary or appropriate for purposes of the HCP will be met; and
- (vi) NMFS has received such other assurances as NMFS required that the HCP will be implemented.

For each Covered Species which is not a Federal Listed Species, NMFS finds that the HCP has satisfied the permit issuance criteria under section 10(a)(2)(B) of the FESA that would otherwise apply if such Covered Species were a Federal Listed Species.

2.2.2 NMFS Obligations

Concurrent with the execution of this Agreement by all Parties, and on satisfaction of all other applicable legal requirements, NMFS will issue to PALCO the Federal Permit under Section 10(a)(1)(B) of the FESA, authorizing the Incidental Take by PALCO of each Covered Species within the jurisdiction of NMFS resulting from Covered Activities on the Covered Lands. The Federal Permit will be conditioned on compliance with the terms and conditions of the Federal Permit, the HCP, and this Agreement.

NMFS shall monitor PALCO's implementation of the HCP and compliance with the Federal Permit, and shall provide technical assistance to PALCO regarding implementation of the HCP throughout the duration of the Federal Permit.

2.3 CDFG

2.3.1 CDFG Findings

For each Covered Species within the jurisdiction of the CDFG, pursuant to the specific findings set forth below that, based on the best available scientific information and other information that is

reasonably available, as of the Effective Date the HCP has satisfied the permit issuance criteria under section 2081(b) of the California Fish and Game Code, CDFG finds that:

- (i) the Taking of the Covered Species will be incidental to an otherwise lawful activity;
- (ii) the impacts of the authorized Take of the Covered Species will be minimized and fully mitigated;
- (iii) the measures set forth in the HCP to minimize and fully mitigate the impacts of the authorized Take of the Covered Species are roughly proportional in extent to the impact of the authorized Taking of the Covered Species;
- (iv) the measures set forth in the HCP to minimize and fully mitigate the impacts of the authorized Take of the Covered Species maintain PALCO's objectives to the greatest extent possible;
- (v) all of the measures set forth in the HCP to minimize and fully mitigate the impacts of the authorized Take of the Covered Species are capable of successful implementation;
- (vi) PALCO has ensured adequate funding to minimize and fully mitigate the impacts of the authorized Take of the Covered Species and for monitoring compliance with, and effectiveness of, such measures;
- (vii) issuance of the State Permit will not jeopardize the continued existence of the Covered Species;
- (viii) the measures set forth in the HCP are intended to ensure that the Covered Activities under the State Permit will avoid the Take of any Fully Protected Species;
- (ix) the measures set forth in the HCP and the Streambed Alteration Agreement incorporated therein are intended to ensure that the effects of the specific Covered Activities on Covered Species, as identified in Exhibit C of the Streambed Alteration Agreement (attached as Exhibit "B") which may substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream, or lake on Covered Lands will be minimized and fully mitigated consistent with CESA and the State Permit, pursuant California to Fish and Game Code section 1603.

2.3.2. CDFG Obligations

Concurrent with the execution of this Agreement by all Parties, and on satisfaction of all other applicable legal requirements, CDFG will issue to PALCO the State Permit under Section 2081(b) of the CESA, authorizing the Incidental Take by PALCO of each Covered Species within the jurisdiction of CDFG resulting from Covered Activities on the Covered Lands. The State Permit will be conditioned on compliance with the terms and conditions of the State Permit, the HCP, and this Agreement.

CDFG shall monitor PALCO's implementation of the HCP and compliance with the State Permit, and shall provide technical assistance to PALCO regarding implementation of the HCP throughout the duration of the State Permit.

2.4 CDF Obligations

Concurrent with the execution of this Agreement by all Parties, and on satisfaction of all legal requirements, CDF will approve the SYP, a component of which is the HCP. CDF shall monitor PALCO's implementation of the SYP, in part, through the THP review process. CDF shall require as a condition of approval of each THP that the THP incorporate all of the conservation and management measures of HCP's Operating Conservation Program that are relevant to the THP. CDF shall monitor and enforce PALCO's compliance with each THP.

3. PALCO RIGHTS AND OBLIGATIONS

3.1. Obligations of PALCO

PALCO will fully and faithfully perform all obligations assigned to it under this Agreement, the Federal Permit, the State Permit and the HCP including, but not limited to the following:

3.1.1 Marbled Murrelet Conservation Areas (MMCA's)

The MMCA's are depicted on Map A, section L.4 of the HCP and described in detail at Section F.1 of the HCP and encompass the following groves:

- (a) Elkhead Residual
- (b) Cooper Mill
- (c) Allen Creek
- (d) Road 3
- (e) Owl Creek
- (f) Shaw Gift
- (g) Right Road 9
- (h) Road 7 and 9 North
- (i) Booth's Run
- (j) Bell Lawrence
- (j) Lower North Fork Elk

For the term of the Federal Permit and State Permit or, if the Federal or State Permit is relinquished or revoked prior to expiration of its 50 year term, until the impacts of Take that occurred under the relinquished or revoked permit are fully mitigated in accordance with section 8.5 of this Agreement, PALCO will engage only in MMCA Conservation Activities within any area designated above as a marbled murrelet conservation area (MMCA).

- (a) The following MMCA Conservation Activities have been determined by the Wildlife Agencies to be compatible with protection of, or beneficial to, the marbled murrelet and its habitat within the MMCA's, and the other Covered Species and their habitats within the MMCA's and shall be allowed within the MMCA's in accordance with the restrictions and conditions identified in Section F.1 of the HCP:
 - (i) Use, maintenance, upgrading, storm proofing, closing and decommissioning of existing, active roads depicted on Map No. 8, Volume V of the Draft SYP/HCP (removal of trees as reasonably necessary to accomplish road use, maintenance and

storm proofing is allowed; however, all trees removed within a Riparian Management zone (RMZ) must be left near the location of their removal);

- (ii) Rock and gravel mining at existing quarry in Allen Creek MMCA as more particularly described in Section C.4.c of the HCP;
- (iii) Establishment of two designated borrow pits within each MMCA. A maximum of four acres may be cleared in connection with existing or new borrow pits within each MMCA over the life of the Permits (removal of trees not to exceed 12 inches dbh per tree is allowed where reasonably necessary to excavate the borrow pits);
- (iv) Scientific surveys conducted as part of the MMCA's monitoring program as more particularly described in Section F.1 of the HCP;
- (v) Removal of trees blocking roads identified in paragraph (1) in conformance with the Aquatics Conservation Plan provided such trees are left near the location of their removal;
- (vi) Fuel removal limited to within old growth residuals stands and second-growth stands with the prior written concurrence of USFWS and CDFG;
- (vii) Fire suppression in accordance with a fire management plan for the MMCAs approved by the Wildlife Agencies within one year of the Effective Date;
- (viii) Stream enhancement projects with prior written concurrence of the Wildlife Agencies; and
- (ix) Hunting allowed during September 16 - March 23 as otherwise authorized by regulation (outside of marbled murrelet nesting season).

Except as provided in subsection (b) of this section 3.1.1, no activities other than the MMCA Conservation Activities listed in this section, as conditioned and restricted in Section F.1 of the HCP, shall be allowed within any MMCA unless the Wildlife Agencies determine, following compliance with all applicable laws and regulations including NEPA and CEQA, that such activities are compatible with protection of, or are beneficial to, the marbled murrelet and its habitat and the other Covered Species and their Habitats consistent with the HCP.

- (b) With the exception of those activities identified in subsection (a) of this section 3.1.1, any activity involving the removal of timber from an MMCA, including pre-commercial and commercial thinning, shall be allowed only on a case by case basis and only if the Wildlife Agencies determine that the specific activity will be beneficial to the marbled murrelet and its habitat, and is in conformance with the Aquatics Conservation Plan. Such timber removal activities will be allowed only at the specific written request and/or written approval of the Wildlife Agencies in advance of such activity, following compliance with all applicable laws and regulations, including NEPA and CEQA. Such compliance shall include determining whether the environmental documentation in existence at that time adequately discloses the impacts of the proposed activity to ensure compliance with NEPA and CEQA. The Wildlife Agencies recognize, however, that the MMCA Conservation Activities identified in subsection (a) are allowed pursuant to this Agreement and the HCP, and therefore will not require any further compliance under NEPA or CEQA on the part of the Wildlife Agencies.

- (c) In each Annual Report, PALCO shall to the extent known identify the proposed MMCA Conservation activities for each of the above-listed MMCAs that PALCO anticipates conducting in such MMCA over the next calendar year. The absence of the description of an MMCA Conservation Activity in an Annual Report shall not preclude PALCO from undertaking such Conservation Activities.

3.1.2 Grizzley Creek Complex

All timber harvesting, including salvage logging and other management activities, shall be prohibited on all lands within the Grizzley Creek Complex as depicted on Map C, Section L.4 of the HCP for a period of five years from the Effective Date to provide an opportunity for purchase and permanent protection of such lands. If such purchase and protection does not occur, then, at the end of the five year period, harvesting of the Grizzley Creek Complex shall be allowed pursuant to the prescriptions applicable to Covered Lands outside of the MMCAs unless prior to the end of the five year period it is determined by USFWS that take resulting from timber harvest and other Covered Activities within the Grizzley Creek Complex would be inconsistent with Section 10(a)(2)(B)(iv) of FESA with regard to the marbled murrelet or by CDFG that harvest or other Covered Activities within the Grizzley Creek Complex would be inconsistent with Section 2081(c) of CESA with regard to the marbled murrelet. To assist USFWS and CDFG in making their respective determinations, USFWS and CDFG shall convene a panel of five independent science advisors ("Grizzley Panel") who shall be qualified in conservation biology and/or marbled murrelet biology. USFWS, CDFG and PALCO shall each designate one member of the Grizzley Panel and the three designated panel members shall collectively designate two additional panel members by unanimous vote.

- (i) The panel members shall be designated before the beginning of the fifth year following the Effective Date and the Grizzley Panel shall convene within 45 days after its establishment;
- (ii) The Grizzley Panel shall consider the available scientific information relevant to the marbled murrelet population across its listed range in California, Oregon and Washington, including marbled murrelet biology, current status, population trends, habitat requirements and, in particular, information developed since the Effective Date. USFWS, CDFG and PALCO shall cooperate fully in providing relevant information and assistance to the Grizzley Panel;
- (iii) A minimum of four months prior to the five year anniversary of the Effective Date, the Grizzley Panel shall provide a written report to USFWS, CDFG and PALCO regarding the factors relevant to USFWS's and CDFG's determinations. Additionally, each member of the Panel may submit his or her separate views.
- (iv) Pursuant to section 10(a)(2)(B)(iv) of FESA, the USFWS shall determine whether the take resulting from timber harvest and other Covered Activities within the Grizzley Creek Complex in accordance with the HCP will appreciably reduce the likelihood of the survival and recovery of the marbled murrelet. USFWS shall make its determination in accordance with 50 C.F.R. Part 402 . Any such determination shall be accompanied by an analysis of the available scientific information including the written report of the Grizzley Panel.
- (v) Pursuant to section 2081(c) of the California Fish and Game Code, CDFG shall determine whether the take resulting from timber harvesting and other Covered Activities within the Grizzley Creek Complex in accordance with the HCP will jeopardize the continued existence of the marbled murrelet throughout all or significant portion of its range across

California, Oregon and Washington. Any such determination shall be accompanied by an analysis of the available scientific information, including the written report of the Grizzly Panel.

- (vi) If USFWS determines that allowing timber harvest and other Covered Activities within the Grizzly Creek Complex would be inconsistent with Section 10(a)(2)(B)(iv) with regard to the marbled murrelet or CDFG determines that allowing timber harvest and management activities would be inconsistent with Section 2081(c) of CESA with regard to the marbled murrelet, then all lands within the Grizzly Creek Complex shall be protected as an MMCA as provided in Section 3.1.1.

3.1.3 Implementation of Operating Conservation Program

PALCO will implement all of the conservation and management measures included in the HCP's Operating Conservation Program, including the measures provided for under the Aquatics Conservation Plan and Changed Circumstances sections of the program. The Aquatics Conservation Plan measures are identified in Section F.1 of the HCP.

3.1.3.1 Watershed Analysis

PALCO will work collaboratively with the Wildlife Agencies and other Federal and state regulatory agencies to develop site-specific conservation and management prescriptions for aquatic Covered Species necessary to achieve over time properly functioning aquatic habitat conditions through the watershed analysis process incorporated into the Aquatics Conservation Plan of the HCP's Operating Conservation Program, described at Section F.3 of the HCP.

- (a) Within 60 days from the Effective Date, PALCO, in consultation with the Wildlife Agencies, shall establish a schedule for completing the watershed analysis process within five years.
- (b) At least one representative from PALCO and each of the Wildlife Agencies will serve on watershed analysis teams to develop site-specific conservation and management prescriptions for each watershed within the Plan Area containing Covered Lands. If available, a representative from the U.S. Environmental Protection Agency and a representative of the California Department of Conservation will also serve on the watershed analysis team. The North Coast Regional Water Quality Control Board and the California Department of Forestry may also each elect to have a representative on the watershed analysis team.
- (c) The watershed analysis team will develop recommended site specific prescriptions which are based on the best available science and data and which are the most compatible with PALCO's operational needs consistent with protection of the affected Covered Species as provided under the Aquatics Conservation Plan of the HCP's Operating Conservation Program.
- (d) Those site-specific prescriptions which are unanimously recommended by the representatives of PALCO and the Wildlife Agencies will be established by the Wildlife Agencies as the site-specific conservation and management prescriptions for that watershed. In the event the watershed analysis team develops one or more prescriptions that are not recommended unanimously by the PALCO and Wildlife Agency representatives, PALCO or any of the Wildlife Agencies may request that such

prescriptions be reviewed by the Peer Review Panel established pursuant to subparagraph (k) of this section in accordance with the following process:

- (i) The Wildlife Agencies shall refer the recommended site-specific prescriptions to the Peer Review Panel. The Peer Review Panel shall review the analysis and recommended prescriptions in accordance with the criteria established pursuant to subparagraph (c);
 - (ii) The Peer Review Panel shall submit a written report of its findings to the Wildlife Agencies and PALCO within 90 days of referral. In addition, each member of the Panel may also submit his or her separate views.
- (e) Once the watershed analysis process for a particular watershed has been completed, including review by the Peer Review Panel as appropriate, the Wildlife Agencies will work cooperatively to establish a uniform set of site-specific prescriptions. The Wildlife Agencies will establish site-specific prescriptions which are the most compatible with PALCO's operational needs, consistent with protection of the affected Covered Species as provided under the Aquatics Conservation Plan of the HCP's Operating Conservation Program.
- (f) If USFWS, NMFS or CDFG establishes prescriptions that differ from the prescriptions proposed through the watershed analysis process, USFWS, NMFS or CDFG, as applicable, shall state in writing its reasons for doing so.
- (g) PALCO shall implement the site-specific conservation and management prescriptions established by the Wildlife Agencies for each watershed pursuant to paragraph (e).
- (h) Until PALCO has implemented the site-specific conservation and management prescriptions for a particular watershed established by the Wildlife Agencies pursuant to paragraph (c), PALCO shall apply the prescriptions described in Section F.3 of the Aquatics Conservation Plan to the watershed.
- (i) The site-specific conservation and management prescriptions established by the Wildlife Agencies for Class I and Class II watercourses pursuant to paragraph (e) shall be implemented by PALCO so that those prescriptions result in a no-cut buffer of not less than 30 feet (slope distance), and not more than 170 feet (horizontal distance) on each side of each Class I and Class II watercourse. However, with respect to the minimum 30 foot no-cut buffer on Class II watercourses, the Wildlife Agencies may adjust the buffer if the Wildlife Agencies determine that it will benefit aquatic habitat or species. However, in no event may the minimum no cut buffer be less than 10 feet (slope distance).
- (j) Pursuant to Aquatics Conservation Plan, USFWS and NMFS, in consultation with CDF, the North Coast Regional Water Quality Control Board and CDFG, shall develop a peer review process to evaluate on a spot check basis the appropriateness of completed analysis and prescriptions that are developed through the watershed analysis process.
- (k) Within six months of the Effective Date, the Wildlife Agencies and PALCO shall establish the Peer Review Panel described in paragraph (d). PALCO shall designate one member of the panel, USFWS and NMFS shall collectively designate one member of the panel and CDFG shall designate one member of the panel. The three appointed members shall collectively designate two additional members by unanimous vote.

3.1.4 Review of Timber Harvest Plans

PALCO shall submit each timber harvest plan (THP) which includes Covered Lands to NMFS in Santa Rosa, California and to USFWS in Yreka, California at least 30 days prior to the earliest possible date of THP approval by CDF, for review and comment and a finding as to whether the THP is consistent with the Federal Permit. The THP shall incorporate all of the conservation and management measures of the HCP's Operating Conservation Program that are relevant to the particular THP.

3.1.5 No Increase in Take

This Section 3.1 does not authorize any modification that would result in an increase in the amount and nature of Take, or increase the impacts of Take, of Covered Species beyond that authorized under the Federal Permit and State Permit and any amendments thereto (including any environmental document evaluating the HCP or amendments thereto). Any modification that would result in such an increase in Take beyond that authorized under the Federal Permit and State Permit must be approved as a permit amendment under Section 7.2 of this Agreement.

3.2. Covered Activities

As of the Effective Date, PALCO may Take the Covered Species incidental to the Covered Activities on the Covered Lands, as authorized by and subject to the conditions of the Federal Permit, the State Permit, the HCP and this Agreement. Activities under approved THPs that are determined by CDF to be consistent with the February 27, 1998 Pre-Permit Agreement in Principle, and that are implemented in whole or in part after the Effective Date, are covered under the Federal Permit and State Permit provided that all THPs, approved on or after the Effective Date, and all activities under such THPs, shall comply with the HCP's Operating Conservation Program.

The authority issued to PALCO hereunder applies to all of PALCO's officers, directors, employees, agents, subsidiaries, affiliates, affiliated entities, contractors, and subcontractors, and their officers, directors, employees and agents who engage in any Covered Activity. Solely for purposes of the Federal Permit and the State Permit and this Agreement, PALCO's employees, agents, subsidiaries, affiliates, affiliated entities, contractors, and subcontractors, and their officers, directors, employees and agents shall be deemed under the direct control of, and acting as agents of PALCO. PALCO shall conduct an educational program, approved by the Wildlife Agencies, to fully inform all such persons and entities of the terms and conditions of the Federal Permit and State Permit, including the conservation and management measures required under the HCP's Operating Conservation Program, and shall be responsible for supervising their compliance with those terms and conditions. All contracts between PALCO and such persons and entities shall require their compliance with the Federal Permit and State Permit. Solely for the purposes of the Federal Permit, the State Permit and this Agreement, PALCO shall remain legally responsible for the Covered Activities of each such person or entity.

3.3 Funding

PALCO warrants that it has, and will expend, such funds as may be necessary to fulfill all of its conservation and management obligations under the Federal Permit and State Permit as described in the HCP's Operating Conservation Program and this Agreement. The funding sources that PALCO will use to fulfill its Permit obligations will include income derived from PALCO's Covered Activities on the Covered Lands. By February 1 of each year the Federal and/or State Permit is in effect, PALCO shall submit, concurrently with its submission of the Annual Report, an annual budget with

regard to its obligations under the HCP, approved by its Board of Directors, to the Wildlife Agencies, demonstrating that sufficient funds to carry out PALCO's commitments under the Federal Permit and State Permit for that fiscal year have been authorized for expenditure. PALCO will promptly notify the Wildlife Agencies of any material change in PALCO's funding resources.

A material change in PALCO's funding resources is any change in the financial condition of PALCO which will adversely affect PALCO's ability to manage the Covered Lands in accordance with the terms of this Agreement and the HCP's Operating Conservation Program.

PALCO shall provide the first annual budget covering the period immediately following permit issuance up to the end of the first calendar year of operation within 15 days of the Effective Date.

As a form of additional assurance of adequate funding to carry out all of its Federal Permit and State Permit obligations, PALCO shall post security to CDFG within 15 days of the Effective Date. The amount of security posted shall be in the amount of \$2 million, which is based on the annual estimated cost of carrying out such obligations which are described in Section H of the HCP attached as Appendix P to the FEIS/EIR. The security may be a pledged savings or trust account, certificate of deposit, irrevocable letter of credit, or other form approved by the Wildlife Agencies.

The security shall be renewed automatically annually and replenished as necessary to the amount of \$ 2 million until PALCO completes its obligations under the Federal Permit and State Permit. The security shall be adjusted annually for inflation.

3.4. Monitoring and Reporting

3.4.1. Monitoring

PALCO shall implement the implementation and effectiveness monitoring programs described in Section F of the HCP. As part of the monitoring programs, PALCO shall fund for the life of the Federal Permit and State Permit a third party entity or entities, selected and approved by the Wildlife Agencies, to monitor on behalf of the Wildlife Agencies PALCO's implementation of the HCP's Operating Conservation Program (the "HCP Monitor"). The HCP Monitor shall also monitor the effectiveness of the HCP's Operating Conservation Program if so directed by one or more of the Wildlife Agencies. The HCP Monitor shall be qualified in forestry and fisheries and wildlife biology. The HCP Monitor shall have full access at all times to PALCO's lands to inspect the Covered Activities, and in particular shall be present on site during each timber harvest conducted by or on behalf of PALCO. The HCP Monitor shall immediately report to designated representatives of the Wildlife Agencies and CDF any deviations by PALCO from the conservation and management measures provided for under the HCP's Operating Conservation Program, so that the Wildlife Agencies and CDF may take appropriate action to enforce the Federal Permit and State Permit, the State Forest Practice Act and other applicable Federal and state laws. In addition, the HCP Monitor shall report quarterly to the Wildlife Agencies concerning implementation and compliance by PALCO with the HCP's Operating Conservation Program and, if so directed by one or more of the Wildlife Agencies, shall report, as provided for under the HCP's Operating Conservation Program, on the effectiveness of the HCP's Operating Conservation Program. The intensity of the compliance monitoring to be performed by the HCP Monitor will be reevaluated by the Wildlife Agencies at the end of the first ten year period following the Effective Date, and every ten years thereafter, based on PALCO's record of compliance during the prior ten year period.

3.4.2. Annual Reports

As described in the HCP's Operating Conservation Program, PALCO will submit, by February 1 of each year, a report describing the Covered Activities undertaken and results of the Operating Conservation Program, and the proposed Operating Conservation Program activities for the next year for all Covered Lands, including the MMCAs (the "Annual Report"). As applicable, the Annual Report will contain the results of the surveying and data collection for those Covered Species which have multi-year reporting protocols.

The Agencies shall use reasonable efforts to review and provide written comments on each Annual Report within sixty (60) days of receipt thereof. If any Party requests, the Parties shall meet within such 60-day period to review the Annual Report and PALCO's planned activities for the next year.

All Annual Reports will include the following certification from a responsible company official who supervised or directed preparation of the report:

"I certify that, to the best of my knowledge, after appropriate inquiries by myself and/or persons under my control of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete."

3.4.3 Other Information

PALCO will use its reasonable efforts to provide within thirty (30) days of being requested by the Wildlife Agencies, any additional information in its possession or control related to implementation of the HCP that is requested by the Services for the purpose of assessing whether the terms and conditions of the HCP, including the Operating Conservation Program, are being fully implemented.

To the extent feasible, any such further information requests shall be coordinated among the Wildlife Agencies and made in a manner to be as least intrusive as possible to PALCO operations while permitting the Wildlife Agencies to carry out their oversight responsibilities. In that regard, requests made pursuant to this section 3.4.2 shall not require PALCO to prepare any additional reports; instead, PALCO shall be required only to provide information in its possession or control. Nothing in this Agreement requires PALCO to disclose communications that are subject to the attorney work product or attorney-client privilege, or any other privilege applicable at the time the information request is made. PALCO may designate, by notifying the Agencies in writing, any trade secrets or commercial, proprietary, or financial information ("Confidential Information") requested by the Agencies as exempt from disclosure by the Agencies pursuant to a request made under the Federal Freedom of Information Act and/or the California Public Records Act, because such trade secret and/or information so designated (1) is Confidential Information, (2) has not been disclosed to the public by PALCO, and (3) to PALCO's knowledge is not routinely available to the public from other sources. Should "Confidential Information" be requested, the Wildlife Agencies will contact PALCO sufficiently prior to releasing any such information so as to allow PALCO a reasonable opportunity to protect the Confidential Information from release. This provision is not intended to limit the applicability of the Federal Freedom of Information Act and the California Public Records Act.

3.4.4 Agency Monitoring

PALCO acknowledges the necessity for the Wildlife Agencies to closely monitor compliance with Federal Permit and State Permit and the effectiveness of the HCP's Operating Conservation Program and will cooperate fully in such monitoring. PALCO consents to, and will allow, entry at any

reasonable hour by agents or employees of the Wildlife Agencies on the Covered Lands. With regard to CDFG employees, PALCO's consent satisfies the requirements of Fish and Game Code section 857. Agents or employees of the Wildlife Agencies may enter upon all lands where Covered Activities are conducted and premises where records relating to such Covered Activities are kept. In order to monitor compliance with the Federal Permit and State Permit, the effectiveness of the HCP's Operating Conservation Program, Federal Permit, FESA, and CESA, agents or employees of the Wildlife Agencies may enter upon such lands or premises (1) to inspect and monitor the Covered Lands, the Covered Species, and the Covered Activities and (2) to inspect, during reasonable hours, any records or documents required to be kept under the HCP. Such inspections may include: taking photographs, measurements, and samples; interviewing employees, contractors, and agents of PALCO (PALCO shall not be precluded from having a representative present for any such interview); and any other actions that the Wildlife Agencies determine to be necessary for such purposes. The Wildlife Agencies will use reasonable efforts to give reasonable notice to PALCO of planned interviews with PALCO employees or contractors.

This section shall not apply to or limit the authority of Federal law enforcement agents or state peace officers authorized by law to enter Covered Lands to enforce compliance with the HCP, FESA, CESA, or other Federal or state laws. Further nothing in this section is intended to or shall be construed to restrict the right of access to the Covered Lands and Covered Activities provided to the HCP Monitor under Section 3.4.1.

3.5 Phasing Rights

The USFWS, CDFG and PALCO shall work cooperatively to schedule PALCO's harvest of old-growth redwood and residual old-growth redwood outside the MMCAs in a manner which minimizes impacts to marbled murrelets.

4. INCORPORATION OF THE HCP

The conservation and management measures provided for under the HCP's Operating Conservation Program in Section F of the HCP are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP's Operating Conservation Program, the terms of this Agreement will control. In all other cases, the terms of this Agreement and the terms of the HCP's Operating Conservation Program will be interpreted to be supplementary to each other. The terms of the Federal Permit and the State Permit shall control in the event of any direct contradiction between those terms and the terms of this Agreement and the HCP's Operating Conservation Program.

5. LAND TRANSACTIONS

5.1. Acquisition of Land by PALCO Generally

Nothing in this Agreement, the HCP, the Federal Permit or the State Permit limits or restricts PALCO's right to acquire new lands, or interests in such lands, within or outside the Plan Area. Unless such lands are Covered Lands and the Federal Permit and State Permit have taken effect with regard to such lands in the manner provided below, any lands, or interests in lands, as may be acquired will not be covered by the Federal Permit or State Permit except upon amendment of the Federal Permit and State Permit as provided in section 7.2 of this Agreement.

5.2. Effective Date for Covered Lands Acquired After the Effective Date of This Agreement

- (a) The Federal and State Permits will identify all Covered Lands. The Federal and State Permits will take effect with regard to Covered Lands acquired after the Effective Date ("Additional Lands") upon verification by the Services that PALCO has provided evidence of legal control sufficient to implement the provisions of the HCP, the Federal Permit, the State Permit and this Agreement on such Additional Lands. Such Additional Lands shall become Covered Lands on satisfaction of the conditions provided in subsection (b), subject to the following limitations:
- (i) No more than 25,000 acres of Additional Lands may become Covered Lands over the term of the Permit and such Additional Lands must be situated within one mile of the main contiguous portion of PALCO Lands or within the external boundaries of the PALCO Lands and be zoned for timber production. The PALCO Lands are depicted on Map No. 4, Volume V of the Draft SYP/HCP.
 - (ii) No old growth habitat may be included and no additional Take of marbled murrelets will be authorized under the State and Federal Permits within the Additional Lands.
 - (iii) Consistent with the Northern Spotted Owl Conservation Plan at Section F.2 of the HCP, no Take of northern spotted owls will be allowed on any Additional Lands until the Additional Lands have been surveyed to protocol and the baseline is adjusted and population targets modified to conform to the population density targets of the plan.
- (b) Procedure to Include Additional Lands as Covered Lands. PALCO shall submit to the Wildlife Agencies a notice to include Additional Lands as Covered Lands accompanied by a map showing the location and boundaries of the Additional Lands and a complete description of (1) the type of interest acquired, (2) all relevant baseline conditions on the Additional Lands, (3) the Covered Activities that will occur on the Additional Lands, and (4) the amount and timing of Take of Covered Species expected to occur on the Additional Lands.

Such Additional Lands will be included as Covered Lands if the Wildlife Agencies conclude that extension of the HCP provisions to the Additional Lands will not result in impacts not analyzed and mitigated under the HCP and will not result in unauthorized Take under the State and Federal Permits.

- (c) Notwithstanding the 50 year term of the permit, PALCO shall continue to apply the conservation and mitigation measures provided for under the HCP's Operating Conservation Program to Additional Lands, including storm proofing all roads, until the impacts of Take resulting from Covered Activities on the Additional Lands have been fully mitigated in accordance with Section 8.5 of this Agreement and, upon expiration of the permit or its early termination through revocation or relinquishment, shall provide adequate assurances to the Wildlife Agencies as specified at Section 8.5.3 of this Agreement that such Additional Lands will continue to be managed in accordance with the HCP's Operating Conservation Program until and unless full mitigation is complete. In no event shall PALCO be required to continue to manage the Additional Lands in accordance with the Operating Conservation Program of the HCP longer than a period of 50 years

from the date such Additional Lands become Covered Lands in accordance with subsection (b) this section.

- (d) Proof of ownership of the Additional Lands, or proof of the right to engage in the applicable Covered Activities relevant to such parcel and to implement the terms of the HCP on such Additional Lands, with a written commitment by PALCO to carry out the terms of the HCP, this Agreement, the Federal Permit and the State Permit with regard to such Additional Lands shall constitute adequate evidence of legal control required by subsection (a) above as to have the Federal and State Permits take effect for such acquired land.

5.3. Disposition of Covered Lands Other Than in MMCAs

5.3.1 Land Sold With Restrictions

- (a) PALCO's transfer of ownership or control of Covered Lands, or portions thereof, other than in the MMCAs, which transfers are addressed in Section 5.5 of this Agreement, will require prior approval by the Wildlife Agencies and an amendment of the Federal and State Permits in accordance with section 7.2 of this Agreement, except that transfers of such Covered Lands may be processed as minor modifications in accordance with section 7.1 of this Agreement if:
 - (i) The Covered Lands or relevant interests in Covered Lands will be transferred to an agency of the Federal government and, prior to transfer, the Wildlife Agencies have determined that transfer will not compromise the effectiveness of the HCP based on adequate commitments by that agency regarding management of such land; or
 - (ii) The Covered Lands or relevant interests in the Covered Lands will be transferred to a non-Federal entity that has entered into an agreement acceptable to the Wildlife Agencies (e.g., an easement held by CDFG with the Services as third-party beneficiaries, accompanied by the creation of an adequate endowment for the management in perpetuity, or other security acceptable to the Wildlife Agencies, of such transferred Covered Lands) to reasonably ensure that the lands will be managed in such a manner and for such duration so as not to compromise the effectiveness of the HCP; or
 - (iii) The Covered Lands or relevant interests in the Covered Lands will be transferred to a non-Federal entity that, prior to completion of the land transaction, has agreed to be bound by the HCP as it applies to the transferred Covered Lands and has obtained Federal and State incidental take permits following normal permit procedures covering all Covered Species then identified in PALCO's Federal and State Permits which may be Incidentally Taken as a result of activities on the transferred lands covered under the acquiring entity's Incidental Take permits.
- (b) The Wildlife Agencies shall use their reasonable efforts to make any required determinations under subsections (a)(1), (a)(2), and (a)(3) within 60 days of receipt of written documentation from PALCO that the conditions contained in subsections (a), (b), and (c) have been satisfied.
- (c) Upon a transfer of Covered Lands carried out in accordance with this section and section 7.1, the transferred lands shall no longer be deemed to be Covered Lands, and PALCO shall not bear any responsibility for any management activities, nor be liable for any Take

of any Species by any other persons, on such transferred lands. In addition, PALCO will not be required to provide any new, additional or different conservation or mitigation on the remaining Covered Lands beyond that provided in the HCP to account for such sale, exchange or transfer.

5.3.2 Land Sold Without Restriction

PALCO may dispose of Covered Lands without restriction under the following circumstances:

- (a) Where PALCO includes as Covered Lands Additional Lands, and each of the following requirements have been met: (1) concurrent with the disposal of a tract of Covered Lands, PALCO acquires another tract of land; (2) neither the tract to be disposed of nor the tract to be acquired are greater than 2000 acres; (3) the tract PALCO acquires is either larger or no smaller than 95% of the size of the tract disposed of; (4) the tract to be disposed of and the tract to be acquired contain approximately equivalent habitat value; and (5) the addition of the acquired tract as Covered Lands will not result in impacts not analyzed and mitigated under the HCP, or any amendments thereto, and will not result in unauthorized Take under the Federal and State Permits. PALCO shall submit to the Wildlife Agencies a notice indicating its intent to include Additional Lands as Covered Lands as a result of a land swap accompanied by a map showing the location and boundaries of the tract to be disposed of and the tract to be acquired and a complete description of (A) the type of interest acquired, (B) all relevant baseline conditions on the tract to be acquired, (C) the Covered Activities that will occur on the Additional Lands, and (D) the amount and timing of Take of Covered Species expected to occur on the Additional Lands.

Such Additional Lands will be included as Covered Lands if the Wildlife Agencies conclude, after any required environmental analysis, that extension of the HCP provisions to the Additional Lands and the proposed disposal of the tract to be swapped, will not result in impacts additional to or different from those analyzed and mitigated under the HCP and will not result in unauthorized Take under the State and Federal Permits.

- (i) The Federal Permit and State Permit will take effect with regard to the acquired tract upon verification by the Wildlife Agencies that PALCO has provided evidence of legal control sufficient to implement the provisions of the HCP, the Federal Permit, the State Permit, and this Agreement on the acquired tract.
 - (ii) Proof of ownership of the acquired tract or proof of the right to engage in the applicable Covered Activities relevant to such tract and to implement the terms of the HCP on such acquired tract to the reasonable satisfaction of the Wildlife Agencies shall constitute adequate evidence of legal control required by subsection (a)(i), above, so as to have the Federal Permit and State Permit take effect for such acquired tract.
- (b) The transfer is the result of a minor boundary line adjustment between PALCO and an adjacent landowner. The aggregate net acreage of Covered Lands that may be transferred out of PALCO ownership pursuant to minor boundary adjustments under this subsection shall not exceed 500 acres over the 50 year term of the permit.

Upon a transfer of Covered Lands to another landowner carried out in accordance with this section 5.3 and section 7.1, the transferred lands shall no longer be deemed to be Covered Lands, and PALCO shall not bear any responsibility for any management activities, nor be liable for any Take of any

Species by any other persons, on such transferred lands. In addition, PALCO will not be required to provide any new, additional or different conservation or mitigation on the remaining Covered Lands beyond that provided in the HCP to account for such sale, exchange or transfer.

5.4. Disposition of Covered Land Through Permit Amendment

All dispositions of Covered Lands or interests in Covered Lands outside of MMCAs other than those carried out in accordance with sections 5.3 and 7.1 shall be processed as an amendment of the Federal Permit and State Permit in accordance with section 7.2 of this Agreement.

5.5. Disposition of Land in MMCAs

PALCO may sell, exchange or otherwise transfer to a third person one or more of the MMCAs, or a portion thereof, so long as PALCO demonstrates to the reasonable satisfaction of the Wildlife Agencies that the protection to be afforded by such third party (and its successors) to the marbled murrelet and the habitat of the marbled murrelet in such MMCA(s) and to the other Covered Species is equal to or greater than that afforded under the HCP for a period of 50 years from the Effective Date. In such event, PALCO will not be required to provide any new, additional or different conservation or mitigation on the remaining Covered Lands beyond that provided for in the HCP to account for such sale, exchange or transfer. Without limiting the generality of the foregoing, for the purposes of this Agreement, the sale, exchange or transfer to a third party of an MMCA with legally binding restrictions running with the land and reasonably approved by the Wildlife Agencies, or other protection reasonably approved by the Wildlife Agencies, which limit the uses of the MMCA proposed for transfer to those uses specified at section 3.1.1 of this Agreement for a period of 50 years from the Effective Date shall be deemed to constitute protection afforded by such third party (and its successors) that is equal to or greater than that afforded under the HCP. In the event that PALCO sells a MMCA to an entity, the Agencies shall not impose or require any new, additional or different terms, conditions, conservation or mitigation measures or other restrictions on the remaining Covered Lands beyond those specified at section 3.1.1. of this Agreement and Section F of the of the HCP. PALCO's road storm proofing obligations required under the HCP with respect to the transferred lands shall survive notwithstanding any sale, exchange or transfer under this section 5.5.

6. ASSURANCES

6.1. Federal Assurances

6.1.1. Covered Species Listed After the Effective Date

Subject to compliance with all other terms of this Agreement and the HCP, the Federal Permit shall become effective as to each Covered Species which is not a Federal Listed Species concurrent with the listing of such species under FESA.

6.1.2. Migratory Bird Treaty Act, Bald and Gold Eagle Protection Act

- (a) The Federal Permit shall constitute a Special Purpose Permit under 50 C.F.R. § 21.27 for the take of all Covered Species identified at 50 C.F.R. 10.13, excluding bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*), which are listed under the FESA as of the Effective Date (and as to unlisted Covered Species identified at 50 C.F.R. 10.13, when the Federal Permit becomes effective as to such species as provided in section 6.1.1) in the amount and/or number and subject to the terms and conditions specified in the Federal Permit. The Special Purpose Permit shall be valid for a period of

three years from its effective date, provided the Federal Permit remains in effect for such period. The Special Purpose Permit under 50 C.F.R. § 21.27 as described in this section shall be renewed provided that PALCO remains in compliance with the terms of the Federal Permit and this Agreement. Each such renewal shall be valid for the maximum period allowable under the applicable regulations at the time of the renewal (which, as of the Effective Date, is three years), provided that the Federal Permit remains in effect for such period.

- (b) USFWS shall not refer the incidental take of any bald eagle or golden eagle for prosecution under BGEPA if such take is in compliance with the terms and conditions (including amount and/or number) specified in the Federal Permit.

6.1.3. Further Permits

Nothing in this Agreement will limit the right or obligation of any federal agency to engage in consultation with USFWS and/or NMFS required under Section 7 of the FESA. However, in any consultation with regard to the Covered Species that may be required or processed pursuant to Section 7 of FESA (16 U.S.C. § 1536(a)) subsequent to the Effective Date in connection with the Covered Activities, USFWS and NMFS shall, to the maximum extent permitted by law, rely upon, and utilize their respective Section 7 biological opinions issued with regard to the approval of the HCP, and, to the maximum extent permitted by law and regulation, ensure that any conservation and mitigation for Incidental Take of Covered Species identified in such Section 7 biological opinion conforms to the conservation and mitigation provided under the HCP and does not impose any new, additional or different conservation or mitigation measures on PALCO beyond the requirements provided for under the HCP and this Agreement.

6.1.4. Critical Habitat

The USFWS acknowledges that pursuant to the final critical habitat rule promulgated for the marbled murrelet and codified at 50 C.F.R. 17.95(b), the critical habitat designation for the marbled murrelet will not apply to any Covered Lands for so long as the Federal Permit remains in effect. The USFWS and NMFS further agree that they will consider the HCP in their preparation of any proposed determination of critical habitat for any other Covered Species under their respective jurisdictions or revision of critical habitat for the marbled murrelet. USFWS and NMFS agree that if critical habitat is designated for any Covered Species and PALCO is properly implementing the terms of the HCP, the USFWS and NMFS will not require PALCO to commit new, additional or different conservation or mitigation beyond that provided for under the HCP and this Agreement.

6.1.5. Future Listing of Species Other Than Covered Species

- (a) As to each Species that is not a Covered Species that may be affected by the Covered Activities and that is or becomes listed under FESA, USFWS and NMFS, as appropriate, shall, upon proper application by PALCO under Section 10(a) of the FESA and following public review and upon a determination that the application satisfies all applicable statutory and regulatory requirements, issue an incidental take permit to PALCO authorizing the take of such species incidental to the Covered Activities.
- (b) In determining whether any further conservation or mitigation measures are required, beyond those provided pursuant to the HCP, in order to issue such permits or other Take authorizations with respect to such species not identified as Covered Species, USFWS and NMFS shall (1) take into consideration the conservation and mitigation measures

provided in the HCP and hereunder and (2) cooperate with PALCO to minimize adverse impacts of the listing of such species on the Covered Activities consistent with Section 10 of FESA.

6.1.6. Determination of Changed Circumstances and Unforeseen Circumstances

6.1.6.1. Purpose

The purpose of this section 6.1.6 is to apply the USFWS/NMFS Habitat Conservation Plan Assurances ("No Surprises") Rule (the "Assurances Rule"), published in the Federal Register on February 23, 1998 (63 Fed. Reg. 8,859) to this Agreement and the HCP.

6.1.6.2. Availability

The assurances made by USFWS and NMFS in this Section 6.1.6 shall apply so long as the commitments and provisions of the HCP, this Agreement and the Federal Permit applicable to PALCO have been and are being fully implemented by PALCO.

6.1.6.3. No Additional Land, Water or Financial Compensation

For so long as the Federal Permit is in effect, USFWS and NMFS will not require from PALCO the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water or other natural resources with regard to the Covered Species beyond the level and/or amounts allowed for under the HCP's Operating Conservation Program and this Agreement without the consent of PALCO. By way of example and not limitation, seasonal restrictions more stringent than those provided for in the HCP would be considered to be an additional restriction on the use of land. Any additional conservation or mitigation measures required of PALCO by USFWS and/or NMFS in response to an Unforeseen Circumstance shall comply with the Assurances Rule. (As of the Effective Date, the Assurances Rule is published at 50 C.F.R. §17.3, 50 C.F.R. §17.22(b)(5)(iii)(B), 50 C.F.R. §17.32(b)(5)(iii)(B), 50 C.F.R. §222.3, and 50 C.F.R. §222.22(g)(3), and is attached as Exhibit "D".)

6.1.6.4. Changed Circumstances

6.1.6.4.1. HCP Changed Circumstances

USFWS and NMFS agree that Attachment No. 4 to Section K of the HCP contains the complete and exclusive list of all Changed Circumstances.

USFWS and NMFS further agree that unless PALCO otherwise consents, Attachment No. 4 to Section K of the HCP contains the complete and exclusive list of conservation and mitigation measures and/or planned responses that may be required of PALCO to respond to each Changed Circumstance.

6.1.6.4.2. Effect of Occurrence of a Changed Circumstance

Any party to this Agreement shall immediately notify each of the other parties of the existence of a Changed Circumstance. Thereafter, through a Changed Circumstance Notice, USFWS, and/or NMFS shall identify those additional conservation and mitigation measures or the planned response provided in Attachment No. 4 to Section K of the HCP responsive to the particular Changed Circumstance that USFWS and/or NMFS deem necessary to respond to that Changed Circumstance. To the extent consistent with the conservation needs of the Covered Species and their habitats, USFWS and/or NMFS shall select those conservation and mitigation measures from the list of

available responses to such Changed Circumstances set forth in the HCP that are least burdensome on PALCO.

PALCO shall implement the additional conservation and mitigation measures set forth in Notice. If PALCO does not concur with the Changed Circumstances Notice, then PALCO and USFWS and/or NMFS, as applicable, shall utilize the dispute resolution process set forth in section 9.2 of this Agreement to attempt to resolve the dispute. Until such time as the dispute resolution process is concluded, PALCO shall implement the additional conservation and mitigation measures set forth in the Notice. Following the conclusion of the dispute resolution process, PALCO shall implement the conservation and mitigation measures agreed to by the Wildlife Agencies and PALCO in the dispute resolution process. To the extent agreement is not achieved among the Parties through dispute resolution process, without waiving its rights to seek judicial review of the Wildlife Agencies' decision, PALCO shall continue to implement the measures set forth in the Notice.

6.1.6.4.3. Measures Limited to Those Provided Pursuant to the HCP

If additional conservation and mitigation measures are deemed necessary by USFWS or NMFS to respond to a Changed Circumstance and such measures were not provided pursuant to the HCP, USFWS and/or NMFS will not require any new, additional or different conservation and/or mitigation measures from PALCO in addition to those provided for pursuant to the HCP without the consent of PALCO.

6.1.6.5. Unforeseen Circumstances

6.1.6.5.1. Finding of Unforeseen Circumstances

The Regional Director of USFWS and/or the Regional Administrator of NMFS, as appropriate, have the burden of making a finding that Unforeseen Circumstances exist with regard to any Covered Species within the jurisdiction of the respective agency using the best scientific and commercial data available. The findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected Covered Species. USFWS and NMFS must consider, but are not limited to, the following factors in making such finding of Unforeseen Circumstances:

- The size of the current range of the affected Covered Species.
- The percentage of the range of the affected Covered Species that has been adversely affected by the activities permitted by the HCP.
- The percentage of the range of the affected Covered Species that has been conserved by the HCP.
- The ecological significance of that portion of the range of the affected Covered Species affected by the HCP.
- The level of knowledge about the affected Covered Species and the degree of specificity of the Covered Species' conservation program under the HCP.
- Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected Covered Species in the wild.

Upon making a finding of Unforeseen Circumstances in accordance with this paragraph, USFWS or NMFS, as applicable, shall determine whether additional conservation and mitigation measures are necessary to respond to the Unforeseen Circumstances.

6.1.6.5.2. Effect of Finding of Unforeseen Circumstances

Upon a finding of Unforeseen Circumstances and a determination that additional conservation and mitigation measures are necessary to respond to such Unforeseen Circumstances, made in the manner set forth in section 6.1.6.5.1 above, USFWS and/or NMFS as appropriate shall limit such additional conservation and mitigation measures required of PALCO to modifications of activities within the Conserved Habitat Areas, and modifications to the Operating Conservation Program for the affected Covered Species. USFWS and/or NMFS as appropriate shall maintain the original terms of the HCP to the maximum extent possible.

Any additional conservation and/or mitigation measures specified pursuant to section 6.1.6.5 shall not require the commitment by PALCO of additional land, water or financial compensation or additional restrictions on the use of land, water or other natural resources in conflict with section 6.1.6.3 without the consent of PALCO.

PALCO shall cooperate with USFWS and/or NMFS, as appropriate, in that Service's activities with regard to the conservation and/or preservation of the affected Covered Species.

6.1.6.6. Distribution of Burden After Finding of Unforeseen Circumstances

The Services recognize that they bear a primary responsibility to utilize their authorities and resources to protect Covered Species in the event of a finding of Unforeseen Circumstances with regard to a Covered Species. The Services further recognize that they have significant resources and authorities that can be utilized to provide additional protection to Covered Species, including, but not limited to, land acquisition and exchange, habitat restoration and enhancement, translocation, and other management techniques beyond the protections provided in the HCP. The Services will work with other Federal, State, and local agencies, tribes, environmental groups, and private entities to ensure the continued conservation of the Covered Species in the wild in the event of a finding of Unforeseen Circumstances.

6.2. State Assurances

6.2.1. Covered Species Listed After the Effective Date

Subject to compliance with all other terms of this Agreement and the HCP, the State Permit shall become effective as to each Covered Species which is not a State Listed Species concurrent with the regulation of such species under CESA.

6.2.2. Future Regulation of Species Other Than Covered Species

- (a) As to each Species that is not a Covered Species, that may be affected by the Covered Activities and that is or becomes listed or a candidate for listing under CESA, CDFG shall, upon proper application by PALCO under Section 2081(b) of the CESA and following any required public and/or environmental review and a determination that the application satisfies all applicable statutory and regulatory requirements, issue an incidental take permit to PALCO authorizing the Take of such species incidental to the Covered Activities.
- (b) In determining whether further conservation or mitigation measures beyond those provided for pursuant to the HCP are required in order to issue such section 2081(b) permits, or other Take authorizations with respect to such species not identified as Covered Species, CDFG shall (1) take into consideration the conservation and mitigation

measures provided pursuant to the HCP, and (2) cooperate with PALCO to minimize to the greatest extent possible adverse impacts of the listing or candidacy for listing of such species on the Covered Activities consistent with the requirements of Section 2081(b).

6.2.3 Changed Circumstances and Unforeseen Circumstances

6.2.3.1 Purpose

The purpose of this section 6.2.3 is to provide PALCO “No Surprises” like assurances consistent with CDFG regulations given the conservation and mitigation measures provided pursuant to the HCP and other relevant factors. (These regulations are currently published at C.C.R., t. 14, §783.0 and are attached hereto as Exhibit E.)

CDFG may require additional conservation and mitigation measures of PALCO, as enumerated in Attachment No. 4 of Section K of the HCP, in response to Changed Circumstances that affect the Covered Species under the State Permit.

6.2.3.2 HCP Changed Circumstances

CDFG agrees that Attachment No. 4 of Section K of the HCP contains the complete and exclusive list of all Changed Circumstances. CDFG further agrees that unless PALCO otherwise consents, Attachment No. 4 of Section K of the HCP contains the complete and exclusive list of conservation and mitigation measures and planned response that may be required of PALCO to respond to each Changed Circumstance.

6.2.3.2.1 Effect of the Occurrence of a Changed Circumstance

Any party to this Agreement shall immediately notify each of the other parties of the existence of a Changed Circumstance. Thereafter, through a Changed Circumstances Notice, CDFG shall identify those additional conservation and mitigation measures or the planned response provided pursuant to Attachment No. 4 of Section K of the HCP responsive to the particular Changed Circumstance that CDFG deems necessary to respond to that Changed Circumstance. To the extent consistent with the conservation needs of the Covered Species and their habitats, CDFG shall select those conservation and mitigation measures from the list of available responses to such Changed Circumstance set forth in the HCP that are least burdensome on PALCO.

PALCO shall implement the additional conservation and mitigation measures set forth in the Notice upon receipt of the Notice. If PALCO does not concur with the Changed Circumstance Notice, then PALCO and CDFG shall utilize the dispute resolution process set forth in section 9.2 of this Agreement to attempt to resolve the dispute. Until such time as the dispute resolution process is concluded, PALCO shall implement the additional conservation and mitigation measures set forth in the Notice. Following conclusion of the dispute resolution process, PALCO shall implement the conservation and mitigation measures except as otherwise agreed to by the Wildlife Agencies and PALCO in the dispute resolution process. To the extent agreement is not achieved among the parties through the dispute resolution process, without waiving its right to seek judicial review of the Wildlife Agencies’ decision, PALCO shall continue to implement the conservation and mitigation measures set forth in the Notice.

6.2.3.2.2 Measures Limited to Those Provided Pursuant to the HCP

If additional conservation and mitigation measures are deemed necessary by CDFG to respond to a Changed Circumstance and such measures were not provided for pursuant to the HCP, CDFG will not

require any new, additional or different conservation and/or mitigation measures from PALCO in addition to those provided for pursuant to the HCP without the consent of PALCO.

6.2.3.2.3 Consultation With Services

If the Changed Circumstances affects a Covered Species under the State Permit that is also a Covered Species under the Federal Permit, the CDFG shall consult with USFWS and/or NMFS, as appropriate.

6.2.3.3 Unforeseen Circumstances

6.2.3.3.1 Finding of Unforeseen Circumstances

The Director or such other person he or she specifically designates has the burden of making a finding that Unforeseen Circumstances exist with regard to any Covered Species within the jurisdiction of CDFG using the best scientific and commercial data available. The findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected Covered Species. CDFG must consider, but is not limited to, the following factors in making such finding of Unforeseen Circumstances:

- The size of the current range of the affected Covered Species.
- The percentage of the range of the affected Covered Species that has been adversely affected by the activities permitted by the HCP.
- The percentage of the range of the affected Covered Species that has been conserved by the HCP.
- The ecological significance of that portion of the range of the affected Covered Species affected by the HCP.
- The level of knowledge about the affected Covered Species and the degree of specificity of the Covered Species' conservation program under the HCP.
- Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected Covered Species in the wild.

Upon making a finding of Unforeseen Circumstances in accordance with this paragraph, CDFG shall determine whether additional conservation and mitigation measures are necessary to respond to the Unforeseen Circumstances.

6.2.3.3.2 Effect of Finding of Unforeseen Circumstances

Upon a finding of Unforeseen Circumstances and a determination that additional conservation and mitigation measures are necessary to respond to such Unforeseen Circumstances, made in the manner set forth in section 6.2.3.3.1 above, CDFG shall limit such additional conservation and mitigation measures required of PALCO to modifications of activities within the Conserved Habitat Areas, and modifications to the Operating Conservation Program for the affected Covered Species. CDFG shall maintain the original terms of the HCP to the maximum extent possible.

For so long as the State Permit is in effect, any additional conservation and mitigation measures specified pursuant to section 6.2.3 shall not require the commitment by PALCO of additional land, water or financial compensation or additional restrictions on the use of land, water or other natural resources without the consent of PALCO, except as required by law.

PALCO shall cooperate with CDFG in its activities with regard to the conservation and/or preservation of the affected Covered Species.

6.2.4 Fully Protected Species Statutes

- (a) CDFG acknowledges and agrees that if the measures set forth in the HCP are fully complied with, the Covered Activities will not likely result in Take of Fully Protected Species.
- (b) Notwithstanding subsection (a), if the CDFG discovers that such measures are not adequate to prevent Take of a Fully Protected Species, CDFG shall notify PALCO in writing of such discovery and of any new, additional or different conservation and mitigation measures that are necessary to avoid Take of Fully Protected Species. CDFG shall have the burden of demonstrating that the measures in the HCP are not adequate to avoid Take. Upon receipt of such notice, PALCO shall conduct its Covered Activities in a manner that will avoid such Take. PALCO may implement such new, additional or different conservation and mitigation measures set forth in CDFG's notification or other adequate measures agreed to by the Parties to avoid such Take.
- (c) If at any time there is a change of law such that CDFG may issue a State Permit allowing the Incidental Take of any Fully Protected Species, CDFG may, at its own discretion and if appropriate, amend the existing State Permit or issue a new State Permit for Fully Protected Species under the same terms and conditions as the State Permit, to authorize the Take of Fully Protected Species to the extent permitted by law.

6.2.5 Birds of Prey, Nests and Eggs

In the event Take of a Bird of Prey and/or destruction of its nest or eggs is alleged to occur under the HCP, and such Bird of Prey is not listed under CESA or covered in an NCCP Plan, CDFG agrees, to the extent permitted by law, to not refer the matter for prosecution provided PALCO complies with the terms and conditions of the State Permit, the HCP, including the conservation and management measures provided under the HCP's Operating Conservation Program for Birds of Prey and this Agreement.

6.3 Joint Assurances

6.3.1. Compliance With Applicable Laws

A primary purpose of this Agreement is to provide the long-term reconciliation of the Covered Activities on the PALCO Lands and Additional Lands with the conservation and protection of Covered Species. Based on and in consideration of this Agreement, CDF and the Wildlife Agencies hereby agree and assure PALCO that for so long as PALCO complies with the terms and conditions of the Federal Permit and the State Permit and this Agreement:

- (a) CDFG shall, to the maximum extent permitted by law, not recommend or require that PALCO provide new, additional or different conservation or mitigation for Take of Covered Species by Covered Activities on the Covered Lands beyond that required pursuant to the HCP and this Agreement, with regard to CDFG's authorities under, the following statutes: CESA, CEQA, the Porter-Cologne Act, the Forest Practice Act, the Timberland Productivity Act of 1982, Fish and Game Code §§1802, and 3511, and Fish and Game Code §1603 for those Covered Activities subject to and carried out in accordance with the terms of the Streambed Alteration Agreement incorporated into the HCP for so long as the Streambed Alteration Agreement is in effect;

- (b) CDF acknowledges and agrees that the Wildlife Agencies have primary jurisdiction and responsibility for the protection of the Covered Species, and that the HCP, as developed by the Wildlife Agencies and PALCO and in consultation with CDF, will minimize and fully mitigate the Take of Covered Species by the Covered Activities within the Plan Area in accordance with CEQA and CESA. CDF will use the SYP, a component of which is the HCP and the EIS/EIR prepared for the HCP and SYP as program level documents for tiering with later individual Timber Harvest Plans when CDF exercises its responsibilities under the Forest Practice Act and CEQA. CDF may suggest additional conservation measures for Take of Covered Species only when necessary for compliance with CEQA, the Forest Practice Act, or any other law. Any additional conservation measures shall, to the maximum extent practicable, be consistent with the HCP, this Agreement, and the Federal Permit and the State Permit.
- (c) USFWS and NMFS shall, to the maximum extent permitted by law, not recommend or require that PALCO provide new, additional or different conservation or mitigation for Take of the Covered Species from Covered Activities on the Covered Lands beyond that required pursuant to the HCP, and this Agreement and the Federal Permit, with regard to any Service's authorities under the following statutes: FESA, NEPA, Fish and Wildlife Coordination Act (16 U.S.C. §§661-661c), the Fish and Wildlife Act of 1956 (16 U.S.C. §742a), and the Federal Water Pollution Control Act (33 U.S.C. §1251 et seq.).

6.4. PALCO Assurances

6.4.1. Control and Ownership of Subsidiary PALCO Entities

As of the Effective Date, Scotia Pacific Holding Company and Salmon Creek Corporation are wholly-owned subsidiaries of The Pacific Lumber Company.

During the term of the Federal Permit and State Permit, Scotia Pacific Holding Company and Salmon Creek Corporation, and their successors and affiliates, each authorize the Pacific Lumber Company to administer the HCP on its behalf, including preparing and filing reports and communicating with the Wildlife Agencies to The Pacific Lumber Company.

Scotia Pacific Holding Company, Salmon Creek Corporation and The Pacific Lumber Company each acknowledge that the HCP addresses, among other things, conservation and protection of Covered Species on the Covered Lands owned by each of them, and that a failure of any of the companies to carry out any of its obligations under the HCP may affect the viability of the entire HCP and may be attributed to all of the companies. Each of the companies shall carry out its obligations under this Agreement, the HCP, the Federal Permit and the State Permit for the term of the Federal Permit and State Permit or, if either the Federal Permit or State Permit are sooner relinquished or revoked, unless and until its obligations under Section 8.5 of this Agreement to fully mitigate for the impacts of Take of Covered Species are met. Each of the companies hereby recognizes that any breach by it with regard to its obligations under this Agreement or the HCP may result in the suspension and/or revocation of the Federal Permit and State Permit.

7. HCP/PERMIT MODIFICATIONS AND AMENDMENTS

7.1. Minor Modification of HCP and/or This Agreement

7.1.1. Processing Minor Modifications

Any Party may propose minor modifications to the HCP or this Agreement by providing written notice to all other Parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including any effects on operations under the HCP and on Covered Species. The Parties will use reasonable efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective only upon all other Parties' written approval. If, for any reason, a receiving party objects to a proposed modification, the proposed modification must be processed as an amendment of the permit in accordance with section 7.2 of this Agreement.

The Wildlife Agencies will not propose or approve minor modifications to the HCP or this Agreement if the Wildlife Agencies determine that such modifications would result in operations under the HCP that are significantly different from those analyzed in connection with the original HCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the original HCP, or additional Take not analyzed in connection with the original HCP.

7.1.2. Scope of Minor Modifications

Minor modifications to the HCP and this Agreement processed pursuant to this subsection may include but are not limited to the following:

- (i) Corrections of typographical, grammatical, and similar editing errors in the HCP and this Agreement that do not change the intended meaning;
- (ii) Correction of any maps or exhibits to correct errors in mapping;
- (iii) Minor changes to survey, monitoring or reporting protocols;
- (iv) Additions and disposals of Covered Lands in accordance with sections 5.2, 5.3, and 5.5;
and
- (v) Correction of any maps or exhibits to reflect previously approved modifications to the HCP or amendments to the permit.

All proposed modifications, other than minor modifications, shall be processed as permit amendments pursuant to section 7.2 of this Agreement.

7.2. Permit Amendment

7.2.1. General Federal Permit Amendment Process

Upon receipt of a written request from PALCO accompanied by a full written justification and supporting information and all other information required by law, USFWS and NMFS shall use their reasonable efforts to process the proposed amendment within one hundred and eighty (180) days of submission of the complete application for such amendment to the applicable Service, except where longer time periods are required by law. Any decision of USFWS and NMFS approving or rejecting a requested amendment will be based on relevant information including, but not limited to, the evidence and science existing at the time of the decisions and will constitute final agency action.

USFWS shall interpret its authority under 50 C.F.R. § 13.23(b) to amend the USFWS Federal Permit consistent with the assurances provided under 50 C.F.R. § 17.22(b)(5) and 17.32(b)(5).

7.2.2. General State Permit/Streambed Alteration Agreement Amendment Process

Amendment of the State Permit, including minor and major amendments, shall be governed by applicable state regulations. (These regulations are currently published at C.C.R., t.14, §783.6(c) and are attached hereto in Exhibit E.) In accordance with these regulations, minor permit amendments shall be approved and incorporated into the State Permit, or denied, by the CDFG Director within 60 days of PALCO's submission of a request for amendment. Also in accordance with these regulations, requests for major permit amendments shall be reviewed according to the process established in such regulations for initial permit applications, except that the information and analysis provided in support of an application for a major permit amendment may rely on and supplement the information and analysis used in the initial permit application.

CDFG and PALCO may amend the Streambed Alteration Agreement at any time by mutual consent of PALCO and CDFG.

7.2.3. Amendment of the Permit to Allow Covered Activities Within MMCAs

Concurrent with the first and second decennial reviews of the SYP, the Parties shall confer to review progress towards the achievement of the delisting criteria (excluding marine management criteria) contained in the Murrelet Recovery Plan in existence at the time of each review. If PALCO concludes that the delisting criteria (excluding marine management criteria) contained in the Murrelet Recovery Plan as it then exists have been met, PALCO may apply for an amendment to the Federal Permit and State Permit to allow harvest activities within one or more of the MMCAs. The Wildlife Agencies shall process such application in accordance with the time frames set forth in sections 7.2.1 and 7.2.2 of this Agreement, to the extent feasible, and shall approve such amendment if the Wildlife Agencies determine, after complying with the FESA, NEPA, CESA, CEQA and other applicable law, (i) that all delisting criteria have been met, independent of the conservation benefits provided by the MMCA and/or MMCAs which is the subject of the amendment applied for, and (ii) that such amendment is otherwise consistent with the terms of the HCP and this Agreement and meets all other applicable statutory and regulatory requirements.

7.2.4 Compliance with AB 1986

Notwithstanding any other provision of this Agreement, including without limitation §7.2.4, the Federal Permit, the State Permit, this Agreement and the HCP may be amended only to the extent not in conflict with AB 1986, which is attached hereto as Exhibit F.

8. ORIGINAL TERM; SUSPENSION AND/OR REVOCATION; RELINQUISHMENT; EXTENSION; FULL MITIGATION OBLIGATION

8.1. Original Term

This Agreement and the HCP will become effective on the earliest date that the Federal Permit and State Permit are issued. The HCP, the Federal Permit and the State Permit will remain in effect for a period of 50 years from issuance of the original Federal Permit and State Permit except as provided in this Section 8.

8.2. Federal Permit Suspension and Revocation

USFWS and NMFS may suspend and/or revoke the Federal Permit only for cause and in accordance with regulations in force at the time of such suspension or revocation. (As of the Effective Date, these regulations are codified at 50 C.F.R. §§ 13.27 through 13.29, and 222.27, and 15 C.F.R. Part 904.) Any specific decision or order suspending the Federal Permit shall specify either a date or the fulfillment of a condition or conditions on which the suspension will terminate. In the event a suspension has not terminated within three years of its effective date, at PALCO's request the applicable Service shall within 90 days either terminate the suspension or commence a proceeding to revoke the permit. Such suspension or revocation may apply to the entire Federal Permit, or may apply only to specified Covered Species, Covered Lands, or Covered Activities.

During the period of suspension, PALCO shall remain obligated to perform its obligations under the Operating Conservation Program.

NMFS shall revoke and/or suspend the Federal Permit only after an adjudicatory process conducted essentially in the manner set forth at 15 Code of Federal Regulations Part 904 effective as of the Effective Date, a copy of which is attached as Exhibit "C."

Notwithstanding revocation, PALCO shall remain obligated to mitigate for the impacts of all Take that occurred under the Federal Permit prior to its revocation in accordance with Section F of the HCP, pursuant to section 8.5 of this Agreement. Upon completing its full mitigation obligation set forth in section 8.5 of this Agreement, PALCO shall have no further obligations under the Federal Permit.

8.3. State Permit Suspension and Revocation

Suspension and revocation of the State Permit shall be governed by applicable regulations. (These regulations are currently published at C.C.R., t.14, § 783.7. and are attached hereto in Exhibit E.) In accordance with these regulations, CDFG may suspend or revoke the State Permit only pursuant to the following administrative process. Any action to suspend or revoke any privileges under the State Permit shall be limited so as to address the discrete action or inaction that has resulted in the suspension or revocation, to the extent consistent with the species protection purposes of the State Permit. As such, suspension or revocation may apply to the entire State Permit, or may apply only to the specified Covered Species, Covered Lands, or Covered Activities. PALCO shall be notified in writing of any proposed suspension or revocation in accordance with the regulations. Such notice shall identify the reason(s) for such suspension or revocation, the actions necessary to correct the deficiencies, inform PALCO of the right to object to the proposed suspension or revocation. Such notice may be amended at any time by CDFG. In accordance with the regulations, PALCO may file a written objection to the proposed action within 45 calendar days of the date of CDFG's notice. A decision on the proposed suspension or revocation shall be made within 45 days after the end of the objection period. CDFG shall notify PALCO in writing of the Director's decision and the reasons therefor. CDFG shall also provide PALCO with information concerning the right to request reconsideration. The State Permit may not be revoked unless it has first been suspended. The State Permit shall remain valid and effective pending any final determination on suspension, except that it may be suspended immediately if statutory enactment subsequent to the issuance of the State Permit prohibits continuation of the State Permit or a Covered Activity. Suspension or revocation of the State Permit or Covered Activities subject to the Streambed Alteration Agreement may also constitute suspension or cancellation of the Streambed Alteration Agreement or specified Covered Species, Covered Lands or Covered Activities subject to the Streambed Alteration Agreement, as applicable.

Notwithstanding suspension and/or revocation, PALCO shall remain obligated to mitigate for the impacts of Take that occurred under the State Permit prior to its suspension and/or revocation, pursuant to section 8.5 of this Agreement. Upon completing its full mitigation obligation set forth in section 8.5 of this Agreement, PALCO shall have no further obligations under the State Permit.

8.3.1 Suspension

In accordance with applicable regulations, including the procedures described in section 8.3. above, CDFG may suspend the State Permit at any time if PALCO is not in compliance with the conditions of the State Permit, which includes the HCP. During the period of suspension, PALCO shall remain obligated to carry out its obligations under the Operating Conservation Program.

8.3.1.1 Reinstatement of State Permit After Suspension

In accordance with applicable regulations, including the procedures described in section 8.3. above, if PALCO corrects the deficiencies that were the cause of suspension within 60 days of written notification of the Director's decision to suspend the State Permit, the State Permit shall be reinstated.

8.3.2 Revocation

In accordance with applicable regulations, including the procedures described in section 8.3. above, the Director may begin procedures to revoke the State Permit if PALCO fails within 60 days of written notification of the Director's decision to suspend the State Permit to correct the deficiencies that were the cause of the suspension, or if statutory enactments subsequent to the issuance of the State Permit prohibit the continuation of the State Permit or a Covered Activity.

8.3.2.1 Reconsideration of Suspension or Revocation of State Permit

In accordance with applicable regulations, PALCO may request reconsideration of a suspension or revocation of the State Permit. The request for reconsideration must be received by the Regional Manager of Region 1 within 30 days of the date of notification of the decision for which reconsideration is requested. CDFG shall notify PALCO of its decision in writing within 45 days of the receipt of the request for reconsideration. Such decision may be appealed to the Director within 30 days of the date of notification of the decision on the request for reconsideration. The Director's decision on appeal shall be made within 30 calendar days of receipt of the appeal, unless such time is extended for one additional 30-day period for good cause and PALCO is notified of the extension. The Director's decision on appeal shall constitute the final administrative decision of CDFG.

8.3.3 Mitigation Obligations

Notwithstanding any suspension or revocation, PALCO shall remain obligated to mitigate for the impacts of all Take that occurred prior to the State Permit's suspension or revocation, pursuant to Section 8.5 of this Agreement, unless CDFG determines that PALCO has already satisfied such obligation.

8.4. Permit Relinquishment by PALCO

PALCO may relinquish the Federal Permit and/or the State Permit in accordance with the regulations of the applicable Wildlife Agency in force on the date of such relinquishment. (The regulations applicable to relinquishing the Federal Permit are codified as of the Effective Date at 50 C.F.R. §§ 13.26 and 220.31.)

Any relinquishment of the State Permit shall also constitute a termination of the Streambed Alteration Agreement.

Notwithstanding its relinquishment of either the USFWS or the NMFS Federal Permit or State Permit, PALCO shall remain obligated to fully mitigate in accordance with Section 8.5 of this Agreement for the impacts of all Take that occurred under the relinquished permit prior to its relinquishment. Upon completing its full mitigation obligation in Section 8.5 of this Agreement, PALCO shall have no further obligations under the HCP, the Federal or State Permits or this Agreement.

8.5. Full Mitigation Upon Relinquishment or Revocation

8.5.1. Obligation

In the event of relinquishment or revocation of either the USFWS Federal Permit or the NMFS Federal Permit, or the State Permit, PALCO's obligations under this Agreement and the HCP will continue until or unless the Wildlife Agencies determine, in accordance with section 8.5.2 of this Agreement, that all Take of Covered Species that occurred under the affected Federal Permit and State Permit has been fully mitigated. Unlisted Covered Species will be treated as though they were listed species in determining the amount of past take and the mitigation required.

8.5.2. Determination of Full Mitigation

In determining full mitigation for the impacts of Take of the Covered Species, the applicable Wildlife Agency will compare the amount and impact of Take of the Covered Species that has occurred prior to termination with the amount and effect of mitigation that has been provided up to that time. This analysis will take into consideration, among other factors, the duration the permit has been in effect; the location, quantity and quality of habitat of Covered Species that has been modified and preserved; size and contiguity values; landscape linkages and corridors; shape values and edge effects; and unique special features; and, with respect to the marbled murrelet, the extent to which habitat conditions have improved within the residual old growth stands within the MMCAs. The applicable Wildlife Agency will determine the overall improvement of the landscape (for avian and terrestrial species) and the overall improvements in each watershed (for aquatic species), including achievement of properly functioning conditions, if this has happened. Where it has not, the applicable Wildlife Agency will determine progress toward such condition in terms of improvement over the original baseline condition as determined through surveys and the watershed analysis process.

The period to complete full mitigation will not extend beyond the original term of the permit for Covered Lands included in the Permits as of the Effective Date, and with respect to Additional Lands which become Covered Lands during the permit term, the time to complete full mitigation will not extend beyond a period of 50 years from the date the Additional Lands first were included as Covered Lands.

In the event of early termination of any Permit covering aquatic species, PALCO will, in the manner set forth in Section F.3 of the HCP, complete its road storm proofing obligation, and will continue to implement the riparian harvest prescriptions set forth in the HCP unless and until the impacts of Take of the Covered Species which have occurred up to the time of termination have been fully mitigated.

PALCO will continue to implement the requirements of the Northern Spotted Owl Habitat Conservation Plan for the remaining term of the affected permits unless the applicable Wildlife

Agency determines that Take of northern spotted owl has been fully mitigated. If actual northern spotted owl habitat conditions and northern spotted owl population levels at the permit termination date exceed those projected to occur at the end of the 50-year permit, then Take of northern spotted owl will be deemed fully mitigated.

In determining the extent of any mitigation which may be required of PALCO pursuant to Section 8.5.1 of this Agreement, the applicable Wildlife Agency will take into account the biological value to the Covered Species provided by the Headwaters Reserve, unless the Federal or State Permit is relinquished by PALCO, or is revoked by the applicable Wildlife Agency pursuant to Section 8.2 of this Agreement as a result of a material and uncorrected breach by PALCO of its obligations under the revoked Permit, in which event the biological value of the Headwaters Reserve will not be taken into account.

For purposes of this section, a breach shall be deemed corrected if it is capable of being corrected during the life of the Permit and (1) the breach is corrected to the reasonable satisfaction of the applicable Wildlife Agency as soon as practicable, or (2) if such breach is not capable of immediate correction, it is corrected to the reasonable satisfaction of the applicable Wildlife Agency as soon as practicable following notice and request to cure.

8.5.3. Conveyance of Interest in Land Until Full Mitigation Reached

Upon a determination pursuant to sections 8.5.1 and 8.5.2 of this Agreement that PALCO must restrict and/or carry out activities on the Covered Lands for a term of years in order to satisfy the full mitigation obligation, PALCO, prior to the effective date of such relinquishment and within 15 days following a final administrative determination by USFWS to revoke the USFWS Federal Permit or NMFS to revoke the NMFS Federal Permit, shall execute and record a binding covenant running with the land, in form and content acceptable to the Wildlife Agencies that shall commit PALCO, its successors and assigns, to restrict and/or carry out, as appropriate, those activities on those Covered Lands required to mitigate fully for the impacts of the Take of Covered Species that occurred under the Federal Permit and State Permit. The covenant shall specify the duration of PALCO's full mitigation obligation, if any, which in no event shall extend beyond the termination date of the original 50-year Federal Permit and State Permit for all Covered Lands owned by PALCO as of the Effective Date, and for the Additional Lands described in Section 5.2, a period no longer than 50 years from the date the Additional Lands become Covered Lands. The covenant shall name USFWS, NMFS and CDFG as parties with a right to enforce the terms of the covenant.

8.5.4. Termination of HCP Obligations

Following Federal Permit or State Permit revocation or relinquishment, upon receipt of written concurrence from the Wildlife Agencies that it has satisfied its full mitigation obligation, PALCO shall have no further obligations under the HCP, the Federal Permit or State Permit or this Agreement, and the Wildlife Agencies shall within 30 days record a release of covenant.

8.6. Non-Substantive Breaches; Notice; Waiver

So long as PALCO cures, or commences to cure as set forth below in this section, any non-substantive breach, the Wildlife Agencies will not use the occurrence of such breach as a basis for revoking or suspending the Federal Permit and/or the State Permit, or of waiving the Assurances Rule.

Before commencing any proceeding to revoke or suspend the Federal Permit and/or the State Permit, and before asserting based on a non-substantive breach that PALCO is not "fully implementing" the

terms of this Agreement and/or the HCP with regard to the Assurances Rule, the Wildlife Agencies shall provide PALCO written notice of the non-substantive breach with supporting documentation adequate to allow PALCO to determine the nature and extent of the breach. So long as PALCO cures, or commences to cure, the breach within 15 days of receipt of notice, and for those breaches which cannot be cured within such 15-day period completes curing the breach within 60 days, the Wildlife Agencies shall accept the cure and waive the breach.

By way of example and not limitation, failure to provide any report on the date such report is to be delivered to the Wildlife Agencies constitutes a non-substantive breach for the purposes of this section.

9. REMEDIES, ENFORCEMENT AND DISPUTE RESOLUTION

9.1. Remedies

Each party shall have all remedies available in equity to enforce this Agreement, the Federal Permit, the State Permit and the HCP.

- (a) No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing sentence:
 - (i) Retention of Liability. Each Party shall retain whatever liability it would possess for its present and future acts or failure to act without existence of this Agreement.
 - (ii) Landowner Liability. Each Party shall retain whatever liability it possesses as an owner of interests in land.
 - (iii) Enforcement Authority of Federal and State Governments. Nothing contained in this Agreement is intended to limit the authority of the United States government or the State of California to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under FESA, CESA, or other applicable Federal or state law. For purposes of applying the penalty provisions of the FESA and other Federal law, and CESA and other State law, each instance of harvest, destruction, or cutting of a single merchantable viable tree (8 inches or larger dbh) in violation of the terms and conditions of the Federal Permit shall be deemed a separate violation of such permit, the FESA and the FESA's implementing regulations and each instance of harvest, destruction, or cutting of a single commercially viable tree in violation of the terms and conditions of the State Permit shall be deemed a separate violation of such permit, the CESA and the CESA's implementing regulations.
- (b) Injunctive and Temporary Relief. The Parties acknowledge that injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.
- (c) PALCO, CDFG and CDF acknowledge that specific provisions have been included in the HCP and IA in order to meet the conditions specified in AB 1986. These conditions include, among others, those relating to buffers on class 1 and class 2 watercourses; other restrictions relating to class 1, class 2, and class 3 watercourses; implementation of the watershed analysis process; prohibitions on activities within areas designated as MMCAs; conditions on road-related activities; and the consistency of timber harvesting plans submitted by PALCO with the HCP. Violation of any of these provisions will subject

PALCO to all the remedies and enforcement mechanisms available to CDFG, CDF and the State of California, including those set forth in this Agreement and those provided by applicable statutes and regulations. Such remedies and enforcement mechanisms include, without limitation, suspension and revocation of the State Permit by CDFG (IA section 8.3); the imposition of civil and criminal penalties under the California Fish and Game Code and actions for unfair business practices under §5800 of the California Business and Professions Code; misdemeanor prosecutions under the FPA; a suspension or revocation of PALCO's timber operations license; and action against the professional registration of any individual registered professional foresters involved with a violation. Any violation of provisions related to AB 1986 will also be subject PALCO to the remedies and enforcement mechanisms available to the United States and the federal Wildlife Agencies under the ESA and other applicable federal law. [Additional remedies may be added.]

9.2. Dispute Resolution

The Parties recognize that disputes concerning implementation of this Agreement, the HCP, the Federal Permit and/or State Permit may arise from time to time. The Parties agree to work together in good faith to resolve such disputes using the dispute resolution procedures set forth in this section or such other procedures upon which the Parties may later agree. However, if at any time any Party determines that circumstances so warrant, it may seek any available administrative or judicial remedy without regard to the dispute resolution procedures described in this Section 9.2.

Unless the Parties agree in writing upon another dispute resolution process or unless a Party has initiated an administrative or judicial process related to the subject of the dispute, and except where other procedures are otherwise provided for by this Agreement (e.g., Section 3.3.1 relating to the watershed analysis process), the Parties shall use the following process to attempt to resolve the disputes.

9.2.1 Meet and Confer

- (a) Prior to taking an action that would restrict the Covered Activities, or the scope of any Covered Activity, under the Permit(s), the Agency proposing to take the action will provide notice of the proposed action to PALCO. Unless otherwise agreed to by the Parties, at the request of PALCO, the Parties shall meet and confer with regard to the subject of the notice within 10 calendar days of such notice.
- (b) PALCO may, at any time, elevate the dispute to the USFWS Regional Director, NMFS Regional Administrator, CDFG Director, or CDF Director, as applicable.
- (c) The requirement that the Agencies meet and confer with PALCO prior to taking an action described in Section 9.2.1(a) shall not apply to disputes arising from Sections 6.1.6.4.2 (Effect of Occurrence of a Changed Circumstance), 6.1.6.6 (Distribution of Burden After Finding of Unforeseen Circumstances), 6.2.3.2 (Effect of the Occurrence of a Changed Circumstance) or 6.2.4.2 (Effect of Finding Unforeseen Circumstances), or where the applicable Agency determines that the action must be taken immediately to avoid violation of applicable law, including jeopardy to the continued existence of a Federal Listed or State Listed Species. In the case of disputes arising from such sections, the Parties shall meet and confer as soon as possible thereafter, but no later than 10 calendar days after the action by the Agency.

- (d) Any Party may terminate the meet and confer process if such process has not resolved the dispute within 30 days of the meet and confer notice.

9.2.2 Non-Binding Dispute Resolution

If the meet and confer process has not resolved the outstanding dispute relating to Sections 6.1.5 (Future Listing of Species Other Than Covered Species), 6.1.6 (Determination of Changed Circumstances and Unforeseen Circumstances), 6.2.2 (Future Regulation of Species Other Than Covered Species), 6.2.3 (Changed Circumstances), 6.2.4 (Unforeseen Circumstances), 6.2.7 (Further Permits), 6.3 (Joint Assurances), 8.2 (Federal Permit Suspension and Revocation), 8.3 (State Permit Suspension and Revocation), 8.5 (Full Mitigation Upon Relinquishment, Revocation or Suspension), or 10.5(b) (Severability), PALCO may initiate a process of non-binding dispute resolution no later than five (5) calendar days after the conclusion of the meet and confer process. The dispute resolution process shall involve the mutual selection by the applicable Parties of a third person to mediate resolution of the dispute between the Parties. If the applicable Parties fail to agree upon a mediator, the applicable Parties shall each submit three (3) names of proposed mediators to a previously agreed upon objective third person whose sole function shall be to select a mediator from the names submitted. The applicable Parties shall select the objective third person within 60 days after the Effective Date. The Parties may mutually agree to change their selection of such person at any time.

Unless the Parties agree on alternative procedures, the mediator shall conduct the non-binding dispute resolution process as follows:

- (i) The mediator shall consider all relevant evidence or information presented by the Parties;
- (ii) No Party shall have *ex parte* communications with the mediator;
- (iii) Each Party shall have an opportunity to respond to evidence or information presented by another Party;
- (iv) The mediator shall provide an oral or written report or recommendation to each of the applicable Agencies and PALCO.
- (v) The procedure shall conclude and any report or recommendation shall be issued within 30 days of the initiation of the proceeding, unless otherwise agreed to by the applicable Parties.

10. MISCELLANEOUS

10.1. Notices

All notices, demands, or requests from one party to another may be personally delivered, sent by facsimile (with a confirming copy to be sent by overnight mail), sent by recognized overnight delivery service, or sent by mail, certified or registered, postage prepaid, to the addresses stated in this section and shall be effective at the time of receipt of personal delivery, receipt of facsimile transmission, receipt of overnight delivery, or five days after the date of mailing.

PALCO: John A. Campbell
 President and Chief Executive Officer
 The Pacific Lumber Company
 125 Main Street

P.O. Box 37 Scotia, CA 95565

with copies to: Dale A. Head, Esq.
Managing Counsel - Environmental and Litigation
The Pacific Lumber Company
5847 San Felipe, Suite 2600
Houston, TX 77057

Robert D. Thornton, Esq.
Nossaman, Guthner, Knox & Elliott, LLP
18101 Von Karman, Suite 1800
Irvine, California 92715

Jared Carter, Esq.
Frank Shaw Bacik, Esq.
Rawles, Hinkle, Carter, et al.
169 Mason Street, Suite 300
Ukiah, CA 95482

USFWS: United States Fish and Wildlife Service
500 N.E. Multnomah, Suite 607
Portland, Oregon 97232
Attention: Regional Director

with a copy to: Office of the Regional Solicitor
U.S. Department of the Interior
2800 Cottage Way
Sacramento, CA
Attention: Regional Solicitor

NMFS: National Marine Fisheries Service
501 W. Ocean Blvd., Suite 4200
Long Beach, CA 90802
Attention: Regional Administrator

with a copy to: NOAA, Office of the General Counsel
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
Attention: Regional Counsel

CDFG: Director
California Department of Fish and Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814

with a copy to: General Counsel
California Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

CDF: Director
California Department of Forestry and Fire Protection
1416 Ninth Street
Sacramento, CA 95814

with a copy to: Chief Counsel
California Department of Forestry and Fire Protection
1416 Ninth Street
Sacramento, CA 95814

Any party may change the address to which such notices, payments, or other communications may be sent by giving the other parties written notice of such change. The parties agree to accept facsimile transmitted signed documents and agree to rely upon such documents as if they bore original signatures. The parties agree to provide to the others, within seventy-two (72) hours after transmission, such documents bearing the original signatures.

10.2. No Partnership

Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner, or joint venturer of any other Party.

10.3. References to Regulations

Any reference in this Agreement, the HCP, or the Federal Permit to any regulation or rule of USFWS and/or NMFS shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken except that in the event of a future amendment to the Assurances rule which provides less regulatory certainty to PALCO, PALCO may rely on the Assurances Rule in existence as of the Effective Date unless such reliance is prohibited by statute or court order. Any reference in this Agreement, the HCP or the State Permit to any regulation of CDF or CDFG shall be deemed to be a reference to such regulation or rule in existence at the time the action is taken. Any such regulation of CDFG will be interpreted to the maximum extent permitted by law consistent with CDFG assurances regarding Changed Circumstances and Unforeseen Circumstances under Section 6.2.3 of this Agreement.

10.4. Entire Agreement

This Agreement, along with the exhibits attached hereto, the HCP, the Federal Permit and the State Permit, constitutes the entire agreement and understanding between the Parties. This Agreement supersedes any and all prior and contemporaneous agreements, representations or understandings of the Parties, if any, whether oral or written, with respect to the subject matter hereof and contains all of the covenants and agreements among the Parties with respect to said matter. Each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied in this Agreement, the HCP, the Federal Permit and/or the State Permit.

10.5 Severability

- (a) If any provision of this Agreement or the HCP is found invalid or unenforceable, such provision shall be enforced to the maximum extent possible and the other provisions shall remain in effect to the extent they can be reasonably applied in the absence of such invalid or unenforceable provision.
- (b) The State Permit, the Streambed Alteration Agreement, the Federal Permit issued by USFWS, and the Federal Permit issued by NMFS are all separately enforceable. Except as otherwise provided in this Agreement, revocation, suspension or relinquishment of any one such permit shall not automatically cause the revocation and/or suspension of the other permits, provided that any revocation, suspension or relinquishment of a Federal Permit will require a re-evaluation of the other Federal Permit to ensure that the Take authorized by the remaining Federal Permit is not likely to jeopardize the continued existence of, or result in the Take or adverse modification of the designated critical habitat of, a Covered Species listed under the FESA that was included in the revoked, suspended or relinquished Federal Permit. The suspension, revocation or relinquishment of either the NMFS or USFWS Federal Permit is identified as a Changed Circumstance at Attachment No. 4 to Section K of the HCP and PALCO shall comply with the planned response to such Changed Circumstance described at Attachment No. 4 to Section K of the HCP.

10.6 Governing Law

This Agreement shall be governed by FESA and other applicable Federal laws, and the laws of the State of California.

10.7 Elected Officials Not to Benefit

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

10.8 Availability of Federal Funds

Implementation of this Agreement and the HCP and the assurances provided therein, to the extent funds are required by such assurances, by USFWS and NMFS is subject to the requirements of the Federal Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that neither USFWS nor NMFS will be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

10.9 Availability of State Funds

Implementation of this Agreement and the HCP and the assurances provided therein, to the extent funds are required by such assurances, by CDFG is subject to the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of California. The Parties acknowledge that CDFG will not be required under this Agreement to expend any State of California agency's

appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

10.10. Relationship to FESA, CESA and Other Authorities

Nothing in this Agreement is intended to limit or diminish the legal responsibilities of USFWS and NMFS as agencies of the Federal government or CDF or CDFG as agencies of the State of California. In that regard, nothing in this Agreement is intended to limit the authority of USFWS and NMFS to fulfill their responsibilities under FESA or CDFG under CESA, including but not limited to seeking penalties against PALCO.

10.11. Benefit of Agreement; No Third-Party Beneficiaries

This Agreement is solely for the benefit of the State of California, by and through CDF and CDFG, the people of the United States of America by and through USFWS and NMFS, and PALCO. Without limiting the applicability of rights granted to the public pursuant to FESA or other Federal law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal or other injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the parties to this Agreement with respect to third parties shall remain as imposed under existing law.

10.12. Counterparts

This Agreement may be executed by the Parties in several counterparts, each of which shall be deemed to be an original copy.

10.13. Further Actions and Cooperation

From time to time hereafter, the Parties shall execute such instruments and other documents and take such other actions, upon the request of the other, as may be reasonably necessary to carry out the intent of this Agreement. The Wildlife Agencies and CDF agree to reasonably cooperate with PALCO in the implementation of this Agreement. Such cooperation by the Wildlife Agencies and CDF shall include acknowledging, to the extent applicable, that this Agreement remains in full force and effect.

10.14. Technical Assistance by USFWS

The Parties anticipate that over the life of the Federal Permit new data and scientific studies or research will provide valuable information relevant to the biology and conservation status of the marbled murrelet. Should PALCO seek the assistance of independent scientific experts on marbled murrelet biology to evaluate the status of the marbled murrelet, at the request of PALCO, USFWS will provide appropriate technical assistance, within its available resources, to the experts and, in administering the Federal Permit, will consider the views of the experts carefully and in good faith.

10.15. Amendment of the Agreement

This Agreement is not subject to amendment except in a writing signed by all the Parties.

10.16. Applicable Laws

Notwithstanding any other provisions in this Agreement all activities undertaken pursuant to this Agreement, the HCP, or the Federal or State Permits must be in compliance with all applicable

Federal and state laws and regulations, including CESA (including Section 2081) and FESA (including the provisions of Section 7 and Section 10.)

10.17. Successors and Assigns; Permit Assignment

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the parties and their respective successors and assigns. Assignment or other transfer of the Federal Permit shall be governed by the Services' regulations. Assignment or transfer of the State Permit shall be governed by applicable state regulations (These regulations are published at C.C.R., t.14, § 783.6(a) and are attached in Exhibit K.)

10.18 Due Authorization

Each Party represents and warrants that the signatory is authorized to execute this Agreement on behalf of that Party.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the Effective Date.

Dated: _____

THE PACIFIC LUMBER COMPANY

By: _____

John A. Campbell
President and Chief Executive Officer

SCOTIA PACIFIC HOLDING COMPANY

By: _____

John A. Campbell
President and Chief Executive Officer

SALMON CREEK CORPORATION

By: _____

John A. Campbell
President and Chief Executive Officer

UNITED STATES FISH AND WILDLIFE SERVICE

By: _____

Michael J. Spear
Manager, California/Nevada Operations Office

Approved as to form:
OFFICE OF THE REGIONAL SOLICITOR
U.S. Department of the Interior

By: _____
David Nawi
Regional Solicitor

NATIONAL MARINE FISHERIES SERVICE

By: _____
William T. Hogarth, Ph.D.
Regional Administrator

Approved as to form:
OFFICE OF GENERAL COUNSEL
National Oceanic and Atmospheric Administration
U.S. Department of Commerce

By: _____
Monica P. Medina
General Counsel

CALIFORNIA DEPARTMENT OF FISH AND GAME

By: _____
Jacqueline E. Schafer
Director

Approved as to form:
GENERAL COUNSEL
California Department of Fish and Game

By: _____
Linus S. Masouredis
General Counsel

CALIFORNIA DEPARTMENT OF FORESTRY
AND FIRE PROTECTION

By: _____
Richard Wilson
Director

Approved as to form:
GENERAL COUNSEL
California Department of Forestry and Fire Protection

By: _____
Norman E. Hill
Chief Counsel

EXHIBIT A

LIST OF COVERED SPECIES

List of Covered Species for Exhibit A

- Pacific fisher
- bald eagle
- peregrine falcon
- marbled murrelet
- northern spotted owl
- southern torrent salamander
- tailed frog
- northern red-legged frog
- foothill yellow-legged frog
- northwestern pond turtle
- California red tree vole
- western snowy plover
- bank swallow
- coho
- chinook
- steelhead
- cutthroat trout

EXHIBIT B

FORM OF STREAMBED ALTERATIONS AGREEMENT

PUBLIC REVIEW DRAFT

STREAMBED ALTERATION AGREEMENT WITH REGARD TO THE PACIFIC LUMBER COMPANY HABITAT CONSERVATION PLAN

By And Among

THE CALIFORNIA DEPARTMENT OF FISH AND GAME (“CDFG”)

and

**THE PACIFIC LUMBER COMPANY,
SCOTIA PACIFIC HOLDING COMPANY, AND
SALMON CREEK CORPORATION (collectively, “PALCO”)**

4

_____, 1999

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LIST OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>
A	Implementation Agreement regarding Pacific Lumber Company Habitat Conservation Plan
B	Covered Activities Subject to California Fish and Game Code Section 1603
C	Specific Covered Activities Covered Under the Streambed Alteration Agreement
D	Measures Necessary for Protection of Fish and Wildlife Resources from Impacts of Specific Covered Activities Covered Under the Streambed Alteration Agreement
E	Definition of Alaskan Curve
F	National Marine Fisheries Service Water Drafting Procedures

CALIFORNIA DEPARTMENT OF FISH AND GAME
Region 1
601 Locust Street
Redding, California 96001

Notification No. _____

AGREEMENT REGARDING PROPOSED STREAM ALTERATION

This STREAMBED ALTERATION AGREEMENT ("Agreement") is entered into as of the Effective Date by and among the CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG"), an agency of the State of California, and THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY and SALMON CREEK CORPORATION (collectively, "PALCO" as defined in Exhibit "A").

These entities may be referred to collectively as "Parties" and each individually as a "Party."

Recitals and Purposes

1. PALCO owns approximately 211,000 acres within Humboldt County, California (the "PALCO Lands"). PALCO is in the process of acquiring and is planning to acquire certain additional lands near or adjacent to the PALCO Lands (the "Additional Lands"; the PALCO Lands and Additional Lands are referred to collectively herein as the "Covered Lands"). The Covered Lands fall within several major watersheds in Humboldt County, California. Certain portions of these watersheds form the Plan Area for this Agreement (the "Plan Area" as set forth in Exhibit "A" of Exhibit "A").
- B. CDFG has jurisdiction over the conservation, protection, restoration, enhancement, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species under State law including, but not limited to, California Fish and Game Code section 1600 et **seq.**
- C. Pursuant to Fish and Game Code section 1603, PALCO notified DFG on or about October 29, 1998, concurrent with its application for an incidental take permit under Fish and Game Code section 2081(b) and submittal of a habitat conservation plan and sustained yield plan, which describes the activities PALCO desires to conduct on the Covered Lands. PALCO desires to use the Covered Lands for certain activities, including all activities relating to timber production and harvesting, gravel mining, road construction and maintenance, grazing, stream enhancement projects, fish rearing operations, and the Operating Conservation Program activities as particularly described at Volume I, Part A, of PALCO's Habitat Conservation

Plan/Sustained Yield Plan (the “HCP”), which was prepared by PALCO. The HCP, as approved by CDFG, the United States Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NMFS”), in relation to issuance of incidental take permits by CDFG (the “State Permit”) under the California Endangered Species Act, and USFWS and NMFS (collectively “Federal Permits”) under the federal Endangered Species Act, is set forth in the EIR/EIS and is referred to as HCP/EIR/EIS or approved HCP. The State and Federal Permits cover certain of PALCO’s desired activities, including activities relating to timber production and harvesting, road construction and maintenance, and Operating Conservation Program activities (“Covered Activities”).

- D. The Parties, USFWS, NMFS, and the California Department of Forestry and Fire Protection, have entered into that certain Implementation Agreement dated the Effective Date (attached hereto as Exhibit “A”), which implements the approved HCP, into which this Streambed Alteration Agreement is incorporated. The Parties agree that except as otherwise specifically provided herein, the Implementation Agreement including, but not limited to, the following sections shall govern this Streambed Alteration Agreement: 3.3 funding, 3.4 monitoring and reporting, 8.4 relinquishment, 8.5 full mitigation, 7.2.2 amendment, 9.0 remedies, enforcement and dispute resolution, and 10.0 miscellaneous.
- E. CDFG has determined that certain of the-covered Activities may substantially divert or obstruct the natural flow of or substantially change the bed, channel, or bank of any river, stream, or lake, or use any material from the streambeds on the Covered Lands depending on the location and/or impacts of the Covered Activities. These Covered Activities are listed on Exhibit “B” hereto.
- F. CDFG has determined that of those Covered Activities listed on Exhibit “B”, specific Covered Activities appropriately may be the subject of a five-year Streambed Alteration Agreement. These specific Covered Activities are listed on Exhibit “C” hereto. Those Covered Activities not listed on Exhibit “C” would be addressed under separate notifications and agreements pursuant to the provisions of California Fish and Game Code Section 1603.
- G. CDFG has determined that specific measures, in addition to those provided pursuant to the HCP, are necessary to protect fish and wildlife resources from possible substantial adverse effects of the specific Covered Activities listed on Exhibit “C” hereto. These specific measures are identified on Exhibit “D” hereto.
- 8. PALCO and CDFG acknowledge that this Agreement is entered into with the understanding that its terms may be amended as directed over time by the results of on-going monitoring activities, changed conditions, and

new information. The measures for protection of fish and wildlife resources from impacts of the specific activities subject to this Agreement will be evaluated in light of monitoring results and other new information. Such evaluations shall be used to adapt the measures to better achieve the Agreement's objective to protect fish and wildlife resources.

Agreement

This Agreement is a Streambed Alteration Agreement by and between CDFG and PALCO pursuant to section 1603 of the California Fish and Game Code. PALCO may lawfully conduct the specific Covered Activities identified on Exhibit "C" that may substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake, or use any materials from the streambeds on the Covered Lands pursuant to this Agreement if the specific applicable measures identified on Exhibit "D" hereto are incorporated into these specific Covered Activities in addition to the conservation and management measures required pursuant to the approved HCP, including the Aquatics Conservation Plan.

PALCO hereby agrees to incorporate into the Covered Activities identified on Exhibit "C" hereto the specific applicable measures identified on Exhibit "D" hereto in accordance with the following provisions. Where PALCO determines that conformance with any of the applicable measures identified on Exhibit "D" hereto is not feasible, PALCO may propose alternative measures through a separate notification and agreement pursuant to California Fish and Game Code Section 1603.

PALCO further agrees that the authority given to PALCO under this Agreement applies to all of PALCO's officers, directors, employees, agents, subsidiaries, affiliates, affiliated entities, contractors, and subcontractors, and their officers, directors, employees and agents. Such persons and entities shall be deemed under the direct control of, and acting as agents of PALCO. PALCO shall conduct an educational program, approved by CDFG, USFWS, and NMFS, to fully inform all such persons and entities of the terms and conditions of the approved HCP's Operating Conservation Program, including this Agreement, and shall be responsible for supervising their compliance with the terms and conditions herein. All contracts between PALCO and such persons and entities shall require their compliance with this Agreement. Solely for the purposes of this Agreement, PALCO shall remain legally responsible for the Covered Activities subject to this Agreement of each such person or entity. PALCO shall provide a copy of this Agreement to all such persons and entities performing or supervising Covered Activities subject to this Agreement. Copies of this Agreement shall be readily available at work sites at all times during periods of active work and must be presented to any CDFG personnel.

The Parties agree that the Covered Activities listed on Exhibit "B, " other than those listed on Exhibit "C, " may require

separate notification and agreement pursuant to California Fish and Game Code Section 1603.

1.0 Notification for Authorization to Proceed with Covered Activities

At least 14 calendar days prior to commencing any of the specific Covered Activities identified on Exhibit "C" hereto except road storm-proofing and road maintenance, PALCO shall notify CDFG in writing of its intent to commence such Covered Activity (the "Notification"). For road storm-proofing and road maintenance, PALCO shall give at least three (3) calendar days prior notification in writing of intent to commence such activities.

The Notification will enable CDFG to determine whether or not such Covered Activity is subject to this Agreement, and if so, to enable CDFG to ensure that the applicable measures set forth in Exhibit "D" are incorporated into the activity.

1.1 Presumption

CDFG will presume that the Covered Activity of which it was notified pursuant to the foregoing procedures is subject to this Agreement. Therefore, unless CDFG determines and notifies PALCO within 14 calendar days of the date of Notification that the activity (other than road storm-proofing and road maintenance)[need specifics in exhibits if these are to be covered by this Agreement] is not permitted pursuant to this Agreement, PALCO may commence such activity in accordance with the terms of this Agreement 14 calendar days after notifying CDFG thereof. Unless CDFG determines and notified PALCO within three (3) calendar days of the date of Notification that road storm-proofing or road maintenance is not permitted pursuant to this Agreement, PALCO may commence such activity in accordance with the terms of this Agreement three (3) calendar days after notifying CDFG thereof.

If CDFG determines that the Covered Activity of which it was notified is not subject to this Agreement, PALCO shall not proceed with the Covered Activity except pursuant to a separate agreement under Section 1603 of the California Fish and Game Code, or unless and until the CDFG determines after any dispute resolution pursuant to Section 9.2 of the Implementation Agreement that the Covered Activity is subject to this Agreement.

1.1.1 Effect of Presumption

Notwithstanding the foregoing, this presumption shall not preclude CDFG from taking any appropriate enforcement actions for any violation of the California Fish and Game Code, and any violations of this Agreement.

1.2 Content of Notification

Notification shall consist of the following and shall be deemed received by CDFG upon receipt of all of the following:

- (1) A description of the Covered Activity, including work plans describing the type and scope of the work planned, including the applicable Timber Harvesting Plan (THP) number or operation plans for gravel mining, if available. If necessary to determining which measures set forth in Exhibit "D" apply to the Covered Activity for which notification is given, the description shall also specify whether the activity will be done on a Class I, II, or III watercourse, or a Class II restorable fish-bearing watercourse. For purposes of this Agreement, the terms Class I, Class II, and Class III shall be defined pursuant to the California Forest Practice Rules. For purposes of this Agreement, a Class II watercourse may be deemed restorable fish-bearing pursuant to the THP process. For activities that are not part of a THP process, a watercourse shall be deemed restorable fish-bearing by CDFG in consultation with PALCO. In such case, PALCO shall request a pre-notification consultation for purposes of CDFG's making such determination;
- (2) The commencement and termination dates;
- (3) A map of the work site with sufficient detail to enable a person who is not familiar with the area to easily locate the site;
- (4) Identification of the applicable set of measures listed on Exhibit "D" hereto that will be applied to the Covered Activity;
- (5) If the activity requires any authorization, permit, or entitlement from any federal, state or local agency, a copy of such authorization, permit, or other entitlement; and
- (6) A fee in the amount of \$161.00 in accordance with Section 4.0 of this Agreement.

2.0 Term of the Agreement and Automatic Renewal

This Agreement shall be valid for a period of five years from the Effective Date, provided the State Permit remains in effect for such period. This Agreement shall renew automatically at the expiration of the term of this Agreement, conditioned upon receipt by CDFG of the renewal fee, which shall be submitted to CDFG at least five (5) days prior to the expiration of the term of this Agreement, provided that PALCO remains in compliance with the terms of this

Agreement, the State Permit, the HCP, and the Implementation Agreement, and except as provided in Section 2.1 of this Agreement. Each such renewal shall be valid for the maximum period allowable under law at the time of the renewal (which, as of the Effective Date, is five years), provided that the State Permit remains in effect for such period.

2.1 No Automatic Renewal if Determination of Substantial Change in Conditions

Notwithstanding the foregoing paragraph, in accordance with California Fish and Game Code section 1603(g), if the CDFG determines that there has been a substantial change in conditions, the Agreement will not automatically renew.

CDFG shall make such determination and shall notify PALCO thereof prior to the expiration of the term of the Agreement. If PALCO objects to CDFG's determination, the dispute shall be resolved pursuant to the arbitration provisions set forth in section 1603(b) of the California Fish and Game Code.

3.0 Suspension, Cancellation, Reinstatement, and Reconsideration

3.1 Suspension and Cancellation

Except as otherwise provided, CDFG may suspend or cancel this Agreement only pursuant to the following administrative process. Any action to suspend or cancel any privileges under the Agreement shall be limited so as to address the discrete action or inaction that has resulted in the suspension or cancellation, to the extent consistent with the fish and wildlife resource protection purposes of the Agreement. As such, suspension or cancellation may apply only to the specified Covered Activity or Covered Lands. PALCO shall be notified in writing of any proposed suspension or cancellation. Such notice shall identify the reason(s) for such suspension or cancellation, the actions necessary to correct the deficiencies, inform PALCO of the right to object to the proposed suspension or cancellation. Such notice may be amended at any time by CDFG. PALCO may file a written objection to the proposed action within 45 calendar days of the date of CDFG's notice. A decision on the proposed suspension or cancellation shall be made within 45 days after the end of the objection period. CDFG shall notify PALCO in writing of the Regional Manager's decision and the reasons therefor. The Regional Manager may begin procedures to cancel the Agreement if PALCO fails within 60 days of written notification of the Regional Manager's decision to suspend the Agreement to correct the deficiencies that were the

cause of the suspension, or if statutory enactments subsequent to the execution or renewal of the Agreement prohibit the continuation of the Agreement or a Covered Activity subject to this Agreement.

Notwithstanding the foregoing, in accordance with Section 8.3 of the Implementation Agreement, suspension or revocation of the State Permit or Covered Activities under the State Permit may constitute suspension or cancellation of this Agreement or specified Covered Species, Covered Lands or Covered Activities subject to the Agreement, as applicable.

Notwithstanding suspension and/or cancellation of any privileges under this Agreement, PALCO shall remain obligated to mitigate for the adverse effects that occurred from the actions resulting in suspension or cancellation by properly performing such actions to correct the deficiencies as set forth in CDFG notification to PALCO of proposed suspension or cancellation and the applicable conservation and management measures identified in Exhibit "D" hereto.

3.1.1 Reinstatement After Suspension

If PALCO corrects the deficiencies that were the cause of suspension within 60 days of written notification of the Regional Manager's decision to suspend the Agreement, the Agreement will be reinstated.

3.1.2 Reconsideration of Suspension or Cancellation

PALCO may request reconsideration of a suspension or cancellation of this Agreement. The request for reconsideration must be received by the Regional Manager within 30 days of the date of notification of the decision for which reconsideration is requested. CDFG shall notify PALCO of its decision in writing within 45 days of the receipt of the request for reconsideration. Such decision may be appealed to the Director within 30 days of the date of notification of the decision on the request for reconsideration. The Director's decision on appeal shall be made within 30 calendar days of receipt of the appeal, unless such time is extended for one additional 30-day period for good cause and PALCO is notified of the extension. The Director's decision on appeal shall constitute the final administrative decision of CDFG.

4.0 Fees

Notwithstanding the Section 699.5 of Title 14 of the California Code of Regulations, PALCO shall pay a fee of \$2,400.00 prior to the execution of this Agreement in order to pay the costs of the CDFG in preparing this Agreement. Thereafter, PALCO shall submit with each notification submitted pursuant to this Agreement, a fee of \$161.00 to CDFG in order to pay the costs of the CDFG in administering and enforcing this Agreement. The fee for renewal of this Agreement for another five (5) year term shall be \$2,400.00 in order to pay the costs of CDFG in reevaluating the Agreement. These fees may be adjusted, as necessary, for inflation.

5.0 Compliance with Other Laws

Nothing in this Agreement shall be construed to authorize the violation of any applicable federal, state, or local laws including, but not limited to, California Fish and Game Code Section 5650, the Porter-Cologne Act, and the Forest Practice Rules.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the Effective Date.

Dated: _____

THE PACIFIC LUMBER COMPANY

By: _____
John Campbell
President and Chief Executive Officer

Dated: _____

SCOTIA PACIFIC HOLDING COMPANY

By: _____
John Campbell
President and Chief Executive Officer

Dated: _____

SALMON CREEK CORPORATION

By: _____
John Campbell
President and Chief Executive Officer

Dated: _____

CALIFORNIA DEPARTMENT OF FISH AND GAME

By: _____
Don Koch
Regional Manager

APPROVED AS TO FORM:

Dated: _____

GENERAL COUNSEL
California Department of Fish and Game

By: _____
Ann S. Malcolm
Acting General Counsel

EXHIBIT A

Implementation Agreement

EXHIBIT B
Covered Activities Subject to California Fish and Game Code Section 1603

The following Covered Activities may be subject to California Fish and Game Code Section 1603 depending on the location and/or the impacts of such activities:

1. Timber Management Activities, including
 - (a) timber harvest;
 - (b) site preparation;
 - (c) planting;
 - (d) vegetation management;
 - (e) **thinning;**
 - (f) fire suppression.
2. Road Construction/Reconstruction (including permanent and temporary crossings and fords), Maintenance and Closure;
3. Water Drafting;
4. Rock Quarrying and Borrow Pit Extraction;
5. Scientific Surveys and Studies; and
6. Operating Conservation Program Activities.
 - (a) road storm-proofing
 - (b) implementation and effectiveness monitoring

EXHIBIT C

Specific Covered Activities Covered Under the Streambed Alteration Agreement

The following specific Covered Activities are subject to this Streambed Alteration Agreement:

1. Permanent Road Crossings (Class I and Class II Restorable Fish-bearing Watercourses);
2. Permanent Culvert Road Crossings (Class II and III Watercourses);
3. Temporary Road Crossings (Class I and Class II Restorable Fish-bearing Watercourses);
4. Other Temporary Crossings (Non-Class I Watercourses);
5. Fords (All Watercourses);
6. Water Drafting;
7. Road Construction/Reconstruction involving permanent and temporary crossings and fords; and
8. Operating Conservation Program Activities
 - (a) road storm-proofing involving permanent and temporary crossings and fords.

EXHIBIT D

Measures Necessary for Protection of Fish and Wildlife Resources from Impacts of Specific Covered Activities Subject to This Streambed Alteration Agreement

- I. PERMANENT ROAD CROSSINGS (Class I Watercourses and Class II Watercourses That Are Deemed Restorable Fish-Bearing)
1. Any structure or culvert placed within a Class I watercourses and restorable fish-bearing streams shall be designed, constructed and maintained such that it does not constitute a barrier to upstream or downstream movement of fish. An acceptable alignment or construction would include but is not limited to the supply of water at a depth, and velocity to allow for unimpeded upstream and downstream fish movement.
 2. Bridges are the preferred crossing type for Class I watercourses and restorable fish-bearing streams. Where bridges are used, PALCO shall construct clear span bridges without abutment fills below the ordinary high water mark across such streams. Bridges shall also be set at a high enough level to pass the entire 100-year peak flows and floating debris to the extent feasible. Log stringer bridges may be used, but all surfacing material shall be clean rock if the surfacing material is not otherwise planked, plated or paved. Structural arch culverts may also be used under these same conditions. If not feasible, all bridge construction and abutment materials shall be logs and clean (screened and washed) fill. For purposes of this Agreement, any bridge that spans 30 feet is feasible.
 3. Permanent culverts on fish-bearing streams shall be sized to accommodate 100-year peak flows and to avoid peak flows crossing over the crossings. Size shall be calculated by using at least two methods including the Talbert method and any method identified in Weaver and Hagans (1994). Culverts shall be aligned with the stream channel and installed below stream grade. Culverts shall extend beyond road fill. Culvert fills shall be made failsoft per Weaver and Hagans (1994).
 4. Crossings (bridges or culverts) shall be installed, replaced or repaired when fish are not present, but not sooner than June 15 and not after October 15.
 5. All bare mineral soil exposed in conjunction with crossing construction, maintenance, repair or removal shall be treated for erosion immediately upon completion of work on the crossing. One hundred percent of bare mineral soil, except within the streambed, shall be treated immediately upon completion of work with 4" straw mulch and 100 lbs/acre equivalent barley seed.
 6. Culvert inlets and outlets shall be protected from erosion as appropriate through armoring constructed of graded and backed rock riprap or other non-erodible material (e.g., concrete head wall). Where used, riprap shall be constructed to remain in place during 100-year peak flows, extend at least as high as the top of the pipe and on inlets, and shall extend sufficient distance upstream as "wing walls" to prevent bank erosion. Where armoring is used, outfall of culverts shall be riprapped in a U-shaped channel, with clean material of sufficient size to remain in place during 100-year peak flow events. Rip rap in the channel below the culvert shall be set below grade so as to allow the natural accumulation of bedload at stream grade.
 7. No culvert or bridge is to be located on the curve of a stream, where the radius of curvature is less than or equal to the stream width if a feasible alternative is available.

8. To facilitate adult salmonid migration, the following measures shall be implemented when designing and constructing new or replacement culverts on Class I fish-bearing streams. CDFG recognizes that certain of these measures conflict with other measures in significant ways. For example, the use of culverts large enough to pass 100-year flows frequently may be inconsistent with maintaining a minimum water depth of 1 foot at median flow. CDFG also recognizes that climatic conditions (e.g., drought) and water course size may affect PALCO's ability to comply with certain measures. Regardless, PALCO shall endeavor to achieve compliance with the measures to have the least impact on fish and wildlife resources. These measures shall be reviewed at least every five years by the CDFG and modified as necessary to reflect the best available information on fish passage. These measures pertain primarily to streams which support salmonids.

In addition, streams on PALCO's ownership may support populations of non-salmonid fishes, amphibians and other aquatic organisms, some of which could become listed during the life of the Habitat Conservation Plan. It is, therefore, imperative that PALCO and its agent or contractor responsible for construction, reconstruction and maintenance of crossings on such streams shall be aware of those species present in the effected streams and shall apply culvert specifications commensurate with their biological needs, as appropriate. Such information can be obtained from the CDFG, NMFS and USFWS.

- a. Fish passage shall be provided during at least 90% of the adult migration period to the extent feasible. The migration period for salmon and steelhead is assumed to be a six month period, generally October through March. The "flow duration method" may be used to approximate the 90% peak passage flow for a six month period, i.e., the 95 percentile for on an annual basis or other method approved by CDFG.
- b. At high flows, water velocity and distance between resting pools limit upstream fish passage. The "Alaskan Curve" (attached as Exhibit E) , or alternative methods acceptable to CDFG shall be used to determine the maximum acceptable velocity through the culvert at the 95 percentile flow.
- c. At low flows, water depth in a culvert limits fish passage. A minimum depth of one foot shall be required at the median flow to the extent feasible. Median flow shall be established at the 50 percentile flow.
- d. Culverts shall be installed at 0.5% slope, or less.
- e. Culverts shall be installed with the bottom 1/4 diameter below streambed level. Multiple barrel crossings shall not be used.
- f. Baffles and weirs shall not be used.
- g- Designs which result in the following shall not be permitted:
 - (i) Velocity of 12 feet per second at any point, except during floods;
 - (ii) Sudden changes in velocity causing a barrier to fish passage;
 - (iii) Turbulent flow causing a barrier to fish passage;

- (iv) Changes in culvert alignment;
 - (v) Debris catchers within culvert;
 - (vi) Drop inlet culverts; and
 - (vii) Perched culvert outlets.
9. PALCO shall inspect culverts annually for risk of failure and migration barriers through corrosion, rust or abrasion. Culverts with perforations or separation shall be repaired or replaced between June 15 and October 15. If the repair consists of an insert into a culvert, the repaired culvert shall have an invert roughness comparable to that which existed prior to the repair.
 10. Permanent culverts and bridges shall be maintained and kept open year round. PALCO is responsible for such maintenance as long as the culvert remains in the stream.
 11. The disturbance or removal of vegetation shall not exceed the minimum necessary to complete the operations as described. The channel and bank configuration of the disturbed areas at any crossing shall be restored to as near its original condition as possible. One hundred percent of bare mineral soil, except within the streambed, shall be treated immediately upon completion of work with 4" straw mulch and 100 lbs/acr equivalent barley seed.
 12. If operations require moving of equipment across a flowing stream, such operations shall be conducted without causing a prolonged visible increase in stream turbidity. For repeated crossings, the operator shall install a bridge, culvert, or rock-lined crossing as described. Equipment may be operated in the stream channel of flowing streams only as may be necessary to construct crossings, barriers, fills, or channel changes or during the use of fords. During construction of crossings, if prolonged turbidity may be transported downstream, the flow shall be diverted around the work area by a temporary pipe, diversion channel or pumping, and sediment check dams constructed of screened, washed gravel-will be installed downstream to control the turbidity.
 13. Structures and associated materials that are not designed to withstand high seasonal flows shall be removed to areas above the high water mark before such flows occur.
 14. If the stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to its natural state. The shape and gradient of the streambed shall be as nearly as possible the same gradient as that which existed prior to the disturbance.
 15. Any temporary dam or artificial obstruction required in constructing a permanent road crossing shall only be built from materials such as clean (screened and washed) gravel or other means that will avoid siltation.

II. PERMANENT CULVERT ROAD CROSSINGS (Class II and III Watercourses)

1. Permanent culverts shall have pipes sized to provide 50 year peak flow passage, calculated by using at least two of the methods including the Talbert Method and any method identified in Weaver and Hagans (1994). Culverts shall be aligned with the stream channel. Culverts shall be placed at stream gradient, or have downspouts, or have energy dissipaters at outfall to prevent erosion. Culverts shall

be long enough so that roadfill does not extend or slough past the culvert ends.

2. The inlet of the culvert shall be protected as appropriate through armoring constructed of rock riprap, gabions, concrete, or other non-erodible material. Where used, riprap shall be constructed to remain in place during 50-year peak stream flows, and extend at least as high as the top of the pipe and extended a short distance upstream as “wing walls” if necessary to prevent erosion of the banks. Outlet of culverts shall be riprapped if roadfill sloughing into channel can occur. Where armoring is used, outfall riprapping shall be sufficient to protect the roadfill from erosion and will consist of clean material of sufficient size to remain in place during high flow velocities.
3. If half-round downspouts (flume) are used, they shall be of sufficient size to accommodate entire anticipated flow from the attached culvert. Downspouts shall be securely attached to the culvert, and anchored to the fill slope using deadman posts or cable-anchor assemblies to operate through the life of the crossing.
4. On culverted streams which carry a debris load that could endanger the crossing, a trash/debris catchment structure shall be constructed above the crossing. The design of the trashrack shall be of sufficient strength to withstand high flows, and shall be cleaned or maintained on an annual basis and as necessary to prevent fill scour or overtopping of the crossing.
5. Multiple-pipe culvert crossings shall not be used, except where necessary to maintain an existing roadgrade. Where multiple pipes are used, they shall be offset so that low flows utilize only one pipe.
6. The disturbance or removal of vegetation shall not exceed the minimum necessary to complete the operations as described. The channel and bank configuration of the disturbed areas at any crossing shall be restored to as near its original condition as possible. One hundred percent of bare mineral soil ,except within the streambed, shall be treated immediately upon completion of work with 4” straw mulch and 100 lbs/acre equivalent barley seed.
7. If operations require moving of equipment across a flowing stream, such operations shall be conducted without causing a prolonged visible increase in stream turbidity. For repeated crossings, the operator shall install a bridge, culvert, or rock-lined crossing as described. Equipment may be operated in the stream channel of flowing streams only as may be necessary to construct crossings, barriers, tills, or channel changes or during the use of fords. During construction of crossings, if prolonged turbidity may be transported downstream, the flow shall be diverted around the work area by a temporary pipe, diversion channel or pumping, and sediment check dams constructed of screened, washed gravel will be installed downstream to control the turbidity.
8. Structures and associated materials that are not designed to withstand high seasonal flows shall be removed to areas above the high water mark before such flows occur.
9. If the stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to its natural state. The shape and gradient of the streambed shall be as nearly as possible the same gradient as that which existed prior to the disturbance.
10. When any dam or artificial obstruction is being constructed, maintained, or placed in operation, sufficient water shall at all times be allowed to pass downstream to maintain fish life below the work

area. An adequate fish passage facility must be incorporated into any barrier that obstructs fish passage. Any temporary dam or artificial obstruction shall only be built from materials such as clean (washed and screened) gravel or other means that will avoid siltation.

11. No culverts shall be made of plastic shall be used on Class I watercourses, or perennially flowing Class II watercourses, or installations where connections are required.

III. TEMPORARY ROAD CROSSINGS (Class I Watercourses and Class II Restorable Fish-Bearing Watercourses)

1. Temporary crossings on Class I watercourses and Class II restorable fish-bearing watercourses include bridges, fords and culverts. Fill materials shall include screened washed river run gravel or logs (Humboldt) or both. Materials used as fill materials shall cause no siltation.
2. Temporary crossings (bridges, culverts and fordings) shall be installed, replaced or repaired when fish are not present, but not sooner than June 15 and not after October 15. Bridges and culverts and all top fill materials used for road surfacing at temporary crossings shall be removed and stream channels and banks returned to pre-project condition by October 15. Habitat structures and elements (including pools, riffles, large woody debris and boulders) removed for crossing installation shall be restored to their preconstruction configurations.
3. All bare mineral soil exposed in conjunction with crossing construction, maintenance, repair or removal shall be treated to prevent erosion immediately upon completion of work on the crossing. One hundred percent of bare mineral soil, except within the streambed, shall be treated immediately upon completion of work with straw mulch, jute netting, hydroseeding, or other method identified in Weaver and Hagans (1994).
4. Any structure or culvert placed within a Class I watercourse or Class II restorable fish-bearing watercourse shall be designed, constructed and maintained such that it does not constitute a barrier to upstream or downstream movement of fish. An acceptable design or construction shall include but shall not be limited to providing the supply of water to allow upstream and downstream fish migration.
5. At low flows, water depth in a culvert limits fish passage. A minimum depth of one foot shall be required at the median flow to the extent feasible. Median flow shall be established at the 50 percentile flow.
6. Culverts shall be installed at 0.5% slope, or less.
7. Bottoms of temporary culverts shall be placed at or below stream channel grade.
8. Multiple-barrel crossings shall not be used, except where necessary to maintain an existing roadgrade. Where multiple pipes are used, they shall be offset so that low flows utilize only one pipe.
9. The disturbance or removal of vegetation shall not exceed the minimum necessary to complete the operations as described. The channel and bank configuration of the disturbed areas at any crossing shall be restored to as near its original condition as possible. One hundred percent of bare mineral

soil shall be treated with straw mulch or other erosion control materials immediately upon completion of work.

10. If operations require moving of equipment across a flowing stream, such operations shall be conducted without causing a prolonged visible increase in stream turbidity. For repeated crossings, the operator shall install a bridge, culvert, or rock-lined crossing as described. Equipment may be operated in the stream channel of flowing streams only as may be necessary to construct crossings, barriers, fills, or channel changes or during the use of fords. During construction of crossings, if prolonged turbidity may be transported downstream, the flow shall be diverted around the work area by a temporary pipe, diversion channel or pumping, and sediment check dams constructed of screened, washed gravel will be installed downstream to control the turbidity.
11. Structures and associated materials that are not designed to withstand high seasonal flows shall be removed to areas above the high water mark before such flows occur.
12. If the stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to its natural state. The shape and gradient of the streambed shall be as nearly as possible the same gradient as that which existed prior to the disturbance.
13. When any dam or artificial obstruction is being constructed, maintained, or placed in operation, sufficient water shall at all times be allowed to pass downstream to maintain fish life below the work area. An adequate fish passage facility must be incorporated into any barrier that obstructs fish passage. Any temporary dam or artificial obstruction shall only be built from materials such as clean (washed and screened) gravel or other means that will avoid siltation.

IV. OTHER TEMPORARY CROSSINGS (Non-Class I Water Courses)

1. Temporary crossings include bridges, fords, culverts with local fill, culverts with imported rock fill, and crossings with log fill (Humboldt), and combinations of all three types of crossings. Temporary crossings and all fill materials shall be removed prior to October 15 or when threatened by rising flows. Temporary crossings constructed prior to June 1 shall be sized following the specifications for permanent culvert road crossings.
2. When fill material used in the crossing is removed, channel shape and gradient shall be returned to pre-project condition to the extent feasible. Habitat structures removed during temporary crossing installation shall be restored or replaced in equal quantities after removing the crossing.
3. Culverts with rock or log-fill shall be used when it may be difficult to remove all fill material from the channel, such as deep, incised, steep, or rough channel bottoms, or when flows would transport sediment downstream. Pipe shall be sufficient size to accommodate the expected flow during the use period. Rock fill shall be free of all earthen material. Log fill crossing (Humboldt) shall be constructed by laying choker cables or similar cables across stream channel, then placing pipe and/or sound logs in the channel bottom. The logs shall then be covered with filter fabric and straw mats or rock, with a local topfill for road surfacing. Prior to October 15, the topfill shall be scraped off and the logs shall be removed as a unit by pulling the chokers and loose soil shall be removed from the crossing site using mechanized equipment and/or hand tools, as necessary.
4. Temporary bridges can be flatcars, log stringers, plate, or other designs, which shall be removed

by the end of the work period in each year. Fills for abutments below high water mark shall be log and/or rock. Log stringer bridges shall be surfaced with filter fabric or straw, under a road surface layer of rock, to prevent surface material from entering channel during use.

5. The disturbance or removal of vegetation shall not exceed the minimum necessary to complete the operations as described. The channel and bank configuration of the disturbed areas at any crossing shall be restored to as near its original condition as possible. One hundred percent of bare mineral soil, except within the streambed, shall be treated immediately upon completion of work with 4" straw mulch and 100 lbs/acre equivalent barley seed.
6. If operations require moving of equipment across a flowing stream, such operations shall be conducted without causing a prolonged visible increase in stream turbidity. For repeated crossings, the operator shall install a bridge, culvert, or rock-lined crossing as described. Equipment may be operated in the stream channel of flowing streams only as may be necessary to construct crossings, barriers, fills, or channel changes or during the use of fords. During construction of crossings, if prolonged turbidity may be transported downstream, the flow shall be diverted around the work area by a temporary pipe, diversion channel or pumping, and sediment check dams constructed of screened, washed gravel-will be installed downstream to control the turbidity.
7. Structures and associated materials that are not designed to withstand high seasonal flows shall be removed to areas above the high water mark before such flows occur.
8. If the stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to its natural state. The shape and gradient of the streambed shall be as nearly as possible the same gradient as that which existed prior to the disturbance.
9. Any temporary dam or artificial obstruction required in constructing a temporary road crossing shall only be built from materials such as clean (screened and washed) gravel or other means that will avoid siltation.

V. FORDS (All Watercourses)

1. Fords shall be constructed using rock that shall withstand erosion by expected flow velocities, placed in a U-shaped channel to create a driveable crossing that maintains all surface flow and prevents stream flow from seiving through the crossing. If use of the ford by heavy traffic would result in significant downstream transport of sediment, a temporary crossing shall be installed.
2. Concrete fords are not to be constructed.
3. No native soil may be. pushed into the stream high flow channel, and if stream habitat structures are removed, they shall be restored or replaced in equal quantities after removing the crossing.
4. The disturbance or removal of vegetation shall not exceed the minimum necessary to complete the operations as described. The channel and bank configurations of the disturbed areas of any crossing shall be restored to as near its original condition as possible. One hundred percent of bare mineral soil shall be treated with 4" straw mulch and 100 lbs/acre equivalent barley seed.
5. Except for single crossings associated with set up of yarding operations or reforestation activities,

equipment may be operated in the stream channel only during the use or construction of fords. During construction of or use of fords, discharge of sediment shall be avoided to the maximum extent practicable. In no case, shall the discharge result in amounts deleterious to fish.

6. Structures and associated materials that are not designed to withstand high seasonal flows shall be removed to areas above the high water mark before such flows occur.
7. If the stream channel has been altered during the operations, its low flow channel shall be returned as nearly as possible to its natural state. The shape and gradient of the streambed shall be as nearly as possible the same gradient as that which existed prior to the disturbance.
8. Any ford on a Class I watercourse shall allow unimpeded movement of adult and juvenile fish. Any temporary dam or artificial obstruction on any other watercourse necessary in the construction of a ford shall only be built from materials such as clean (screened and washed) gravel or other means that will avoid siltation.
9. All fords, including those that do not require construction, shall have approaches that are permanently rocked, paved, or otherwise armored with at least 4" of screened, washed gravel, to prevent tracking of soil into the crossing. Approaches shall be winterized (e.g., water bars or placement of erosion control materials) to prevent sediment run-off from entering the ford site.

VI. Water Drafting

All water drafting shall be conducted in accordance with the National Marine Fisheries Service (NMFS) water drafting procedures (attached hereto as Exhibit "F") in effect at the time of the water drafting.

VII. Road Construction/Reconstruction involving permanent and temporary crossings and fords

All road construction and re-construction involving permanent and temporary crossings and fords shall be conducted in accordance with the applicable measures set forth in this Exhibit D, Sections I through V.

VIII. Storm-proofing involving permanent and temporary crossings and fords

All road storm-proofing involving permanent and temporary crossings and fords shall be conducted in accordance with the applicable measures set forth in this Exhibit D, Sections I through V.

EXHIBIT E

Alaskan Curve

EXHIBIT "F"

National Marine Fisheries Service (NMFS) Water Drafting Procedures

1. The screen shall be kept in good repair and shall be used whenever water is diverted.
2. The screen face shall be parallel to the flow of the water.
3. The screen shall have an approach velocity of no more than 0.0825 feet per second. The approach velocity is the velocity of the water through the screen openings.
 - (a) The screen shall have at least 12 square feet of open area per cubic foot per second of the maximum diversion rate (12 sq. ft. of screen per 450 gal./min).
 - (b) Round openings shall not exceed 3/32" in diameter.
 - (c) Square openings shall not exceed 3/32" measured diagonally.
 - (d) Slotted openings shall not exceed 0.0689" in width (approx. 1/16")
4. The screen shall be cleaned as frequently as necessary to prevent the approach velocity from exceeding 0.33 feet per second and to prevent the head differential through the screen from exceeding 2".
5. The diversion rate shall not exceed inflow.

EXHIBIT D
FEDERAL REGISTER

8870 Federal Register /Vol. 63, No. 35 /Monday, February 23, 1998 /Rules and Regulations

have a significant economic impact on a substantial number of small entities, which includes businesses, organizations, or governmental jurisdictions. This final rule will provide non-Federal entities regulatory certainty pursuant to an approved incidental take permit under section 10(a)(1)(B) of the Act. No significant effects are expected on non-Federal entities exercising their option to enter into the HCP planning program because there will be no additional information required through the HCP process due to the application of assurances or "No Surprises." Therefore, this rule would have a minimal effect on such entities. NMFS has also reviewed this rule under the Regulatory Flexibility Act of 1980 and concurs with the above certification.

The implementation of the final Habitat Conservation Plan Assurances rule does not require any additional data not already required by the HCP process. Regulatory assurances are provided to the permittee if the HCP is properly implemented, and if all the terms and conditions of the HCP, permit, or Implementing Agreement are all being met. The underlying economic basis of comparing the final rule with and without the assurances was used to determine if there existed any potential economic effects from implementing this policy. Since the rule is being implemented with existing data, there are no incremental costs being imposed on non-Federal landowners. The benefits generated by this rule are being shared by the Services i.e., less habitat fragmentation, habitat management, and protection for covered species) and by non-Federal landowners (i.e., assurances that approved HCPs will allow for future economic uses of non-Federal land without further conservation and mitigation measures).

There are no specific data to assess the effects on businesses from this rule. To the extent businesses are affected, however, such effects would be positive, not negative. Until specific HCPs are approved, it is not possible to determine effects on commodity prices, competition or jobs. Moreover, any economic effects would likely be tied to the cost of the development and implementation of the HCP itself and not to these assurances. There is a positive effect expected on the environment because these assurances act as an incentive for non-Federal entities to seek HCPs and to factor species conservation needs into national resources management decisions. No effect on public health and safety is expected from this rule. Therefore, this rule most likely would not have a

significant effect on a substantial number of small entities.

The Services have determined and certify pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. No additional information will be required from a non-Federal entity solely as a result of these assurances.

Civil Justice Reform

The Departments have determined that these final regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

National Environmental Policy Act

The Department has determined that the issuance of the final rule is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1.10. NMFS concurs with the Department of Interior's determination that the issuance of the final rule qualifies for a categorical exclusion and falls within the categorical exclusion criteria in NOAA 216-3 Administrative Order, Environmental Review Procedure.

List of Subjects

50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation,

50 CFR Part 222

Administrative practices and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

For the reasons set out in the preamble, the Services amend Title 50, Chapter I, subchapter B; and Title 50, Chapter II, subchapter C of the Code of Federal Regulations, as set forth below:

PART 17-[AMENDED]

Subpart C-Endangered Wildlife

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361+1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub.L. 99-625; 100 Stat. 3500; unless otherwise noted.,

2. The FWS amends §17.3 by adding the following definitions alphabetically to read as follows:

Adequately covered means, with respect to species listed pursuant to

section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan, and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the Service at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse

change in the status of the covered Species.

3. The FWS amends § 17.22 by adding paragraphs (b) (5) and (6) to read as follows:

§ 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.

(b) ***

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies.. This rule does not apply to incidental take permits issued prior to March 25, 1998. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such

measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

(1) Size of the current range of the affected species;

(2) Percentage of range adversely affected by the conservation plan;

(3) Percentage of range conserved by the conservation plan;

(4) Ecological significance of that portion of the range affected by the conservation plan;

(5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild,

(8) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve, a species included in a conservation plan.

Subpart D -- Threatened Wildlife

4. The FWS amends § 17.32 by adding paragraphs (b)(5) and (6) to read as follows:

§17.32 Permits--general.

(b) ***

(5) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (b)(5) apply only to incidental take permits issued in accordance with

paragraph (b)(2) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take permits issued prior to [insert 30 days after the date of publication in the Federal Register]. The assurances provided in incidental take permits issued prior to [insert 30 days after the date of publication in the Federal Register] remain in effect, and those permits will not be revised as a result of this rulemaking.

(i) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(ii) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, the Director will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(iii) *Unforeseen circumstances.* (A) In negotiating unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(B) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Director may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original

terms of the conservation plan without the consent of the permittee.

(C) The Director will have the burden of demonstrating that such unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. The Director will consider, but not be limited to, the following factors:

(1) Size of the current range of the effected species;

(2) Percentage of range adversely affected by the conservation plan;

(3) Percentage of range conserved by the conservation plan;

(4) Ecological significance of that portion of the range affected by the conservation plan;

(5) Level of knowledge about the affected species and the degree of specificity of the species' conservation program under the conservation plan; and

(6) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(6) Nothing in this rule will be construed to limit or constrain the Director, any Federal, State, local, or Tribal government agency, or a private entity, from taking additional actions at its own expense to protect or conserve a species included in a conservation plan.

PART 222-ENDANGERED FISH OR WILDLIFE

5. The authority citation for part 222 is revised to read as follows:

Authority: 16 USC. 1331-1543 and 16 U.S.C. 1361 *et seq.*

Subpart C - Endangered Fish or Wildlife Permits

6. In part 222, a new section is added to read as follows:

222.3 Definitions.

These definitions apply only to § 222.22:

Adequately covered means, with respect to species listed pursuant to section 4 of the ESA, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA for the species covered by the plan and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA that would otherwise apply if the unlisted species

covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and NMFS and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Conservation plan means the plan required by section 10(a)(2)(A) of the ESA that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a conservation plan or its Implementing Agreement, if any, and which are to be undertaken for the affected species when implementing an approved conservation plan, including measures to respond to changed circumstances.

Properly implemented conservation plan means any conservation plan, Implementing Agreement and permit whose commitments and provisions have been or are being fully implemented by the permittee.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and NMFS at the time of the conservation plan's negotiation and development, and that result in a substantial-end adverse change in the status of the covered species,

§222.22 [Amended]

7. In § 222.22, paragraphs (g) and (h) are added.

(g) *Assurances provided to permittee in case of changed or unforeseen circumstances.* The assurances in this paragraph (g) apply only to incidental take, permits issued in accordance with paragraph (c) of this section where the conservation plan is being properly implemented, and apply only with respect to species adequately covered by the conservation plan. These assurances cannot be provided to Federal agencies. This rule does not apply to incidental take-permits issued prior to March 25,

1988. The assurances provided in incidental take permits issued prior to March 25, 1998 remain in effect, and those permits will not be revised as a result of this rulemaking.

(1) *Changed circumstances provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and were provided for in the plan's operating conservation program, the permittee will implement the measures specified in the plan.

(2) *Changed circumstances not provided for in the plan.* If additional conservation and mitigation measures are deemed necessary to respond to changed circumstances and such measures were not provided for in the plan's operating conservation program, NMFS will not require any conservation and mitigation measures in addition to those provided for in the plan without the consent of the permittee, provided the plan is being properly implemented.

(3) *Unforeseen circumstances.* (i) In negotiating unforeseen circumstances, NMFS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.

(ii) If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, NMFS may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

(iii) NMFS will have the burden of demonstrating that unforeseen circumstances exist, using the best scientific and commercial data available. These findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species. NMFS will

consider, but not be limited to, the following factors

(A) Size of the current range of the affected species;

(B) Percentage of range adversely affected by the conservation plan;

(C) Percentage of range conserved by the conservation plan;

(D) Ecological significance of that portion of the range affected by the conservation plan.

(E) Level of knowledge about the affected species and the degree of specificity of the species' conservation

program under the conservation plan; and

(F) Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

(h) Nothing in this rule will be construed to limit or constrain the Assistant Administrator, any Federal, State, local, or tribal government agency, or a private entity, from taking additional actions at its own expense to

protect or conserve a species included in a conservation plan,

Dated: February 13, 1988.

Rolland A Schmitten,

*Assistant Administration for Fisheries
National Marine Fisheries Service.*

Dated: February 11, 1998.

Donald J. Barry,

*Acting Assistant Secretary, Fish, Wildlife, and
Parks, Department of Interior.*

[FR Doc. 98-4367 Filed 2-20-98; 8:45am]

BILLING CODE 4310-55-P

EXHIBIT E

REGULATIONS FOR IMPLEMENTATION OF CALIFORNIA ENDANGERED SPECIES ACT

FINAL ADOPTED REGULATIONS
EFFECTIVE DECEMBER 30,1998

SUBDIVISION 3.

**CHAPTER 6. REGULATIONS FOR IMPLEMENTATION OF THE CALIFORNIA
ENDANGERED SPECIES ACT.**

**ARTICLE 1. TAKE PROHIBITION; PERMITS FOR INCIDENTAL TAKE OF
ENDANGERED SPECIES, THREATENED SPECIES AND CANDIDATE SPECIES**

783.0 Purpose and Scope of Regulations.

This article implements Section 2080 and Section 2081 of the Fish and Game Code. This article does not affect the Department's authority to authorize take pursuant to any other provision of this division.

Authority: Fish and Game Code sections 702 and 2081(d).

Reference: Fish and Game Code sections 2080 and 2081.

783.1 Prohibitions.

(a) No person shall import into this State, export out of this State or take, possess, purchase, or sell within this State, any endangered species, threatened species, or part or product thereof, or attempt any of those acts, except as otherwise provided in the California Endangered Species Act, Fish and Game Code Section 2050, et seq. ("CESA"), the Native Plant Protection Act, the Natural Community Conservation Planning Act, the California Desert Native Plants Act, or as authorized under this article in an incidental take permit.

(b) Subsection (a) applies to any species designated as a candidate species under Section 2074.2 of the Fish and Game Code if the Commission has issued notice under Section 2074.4.

(c) Department wildlife management activities. The possession or take of endangered, threatened, or candidate species by employees and agents of the Department for scientific, educational and management purposes, and for law enforcement purposes, is not prohibited.

(d) Take of insects. The take of insects and other invertebrates that are not fish as defined in the Fish and Game Code is not prohibited.

Authority: Fish and Game Code sections 702, 1001,2081 (a) and 2081(d).

Reference: Fish and Game Code section 2080,2085,2062 and 2067.

783.2 Incidental Take Permit Applications.

(a) Permit applications. Applications for permits under this article must be submitted to the Regional Manager. Each application must include all of the following:

(1) Applicant's full name, mailing address, and telephone number(s). If the applicant is a corporation, firm, partnership, association, institution, or public or private agency, the name and address of the person responsible for the project or activity requiring the permit, the president or principal officer, and the registered agent for the service of process.

(2) The common and scientific names of the species to be covered by the permit and the species' status under CESA, including whether the species is the subject of rules and guidelines pursuant to Section 2112 and Section 2114 of the Fish and Game Code.

(3) A complete description of the project or activity for which the permit is sought.

(4) The location where the project or activity is to occur or to be conducted.

(5) An analysis of whether and to what extent the project or activity for which the permit is sought could result in the taking of species to be covered by the permit.

(6) An analysis of the impacts of the proposed taking on the species.

(7) An analysis of whether issuance of the incidental take permit would jeopardize the continued existence of a species. This analysis shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (A) known population trends; (B) known threats to the species; and (C) reasonably foreseeable impacts on the species from other related projects and activities.

(8) Proposed measures to minimize and fully mitigate the impacts of the proposed taking.

(9) A proposed plan to monitor compliance with the minimization and mitigation measures and the effectiveness of the measures.

(10) A description of the funding source and the level of funding available for implementation of the minimization and mitigation measures.

(11) Certification in the following language:

I certify that the information submitted in this application is complete and accurate to the best of my knowledge and belief: I understand that any false statement herein may subject me to suspension or revocation of this permit and to civil and criminal penalties under the laws of the State of California.

(b) Information requirements; consultation with Department. Responses to the requirements of section 783.2(a)(5)-(a)(9) shall be based on the best scientific and other information that is reasonably available. At an applicant's request, the Department shall, to the greatest extent practicable, consult with the applicant regarding the preparation of a permit application in order to ensure that it will meet the requirements of this article when submitted to the Department. An analysis prepared pursuant to state or federal laws other than CESA that meets the requirements of section 783.2 and 783.3 may be submitted in an incidental take permit application.

Authority: Fish and Game Code sections 702 and 2081(d).

Reference: Fish and Game Code section 2081 (b) and (c).

783.3 Compliance with the California Environmental Quality Act.

(a) Department as responsible agency. In general, the Department will be a responsible agency for purposes of issuing an incidental take permit where another public agency must approve the project or activity for which the permit is sought and the other agency has taken the lead agency role for purposes of compliance with the California Environmental Quality Act, Public Resources Code section 21000, et seq. ("CEQA"). Where the Department will be a responsible agency for purposes of CEQA, the following must be included in the permit application required by section 783.2:

(1) The name, address, telephone number and contact person of the lead agency.

(2) A statement as to whether an environmental impact report, negative declaration, mitigated negative declaration, initial study has been prepared or is being considered, or whether another document prepared pursuant to a regulatory program certified pursuant to Public Resources Code section 21080.5 (and listed in title 14, California Code of Regulations, section 15251) has been prepared or is being considered.

(3) At the option of the applicant, a notice of preparation, notice of determination, or draft or final environmental document may be attached.

(b) Department as lead agency. In general, the Department will act as the lead agency for purposes of CEQA where issuance of the incidental take permit is the only public agency action subject to CEQA that will be taken with regard to the project or activity for which the permit is sought. Where the Department will act as a lead agency for purposes of issuing an incidental take permit, the permit applicant, in addition to the information required by section 783.2, shall provide sufficient information to enable the Department to determine whether the project or activity for which a permit is sought, as proposed, may result in significant adverse environmental effects in addition to the impacts of taking analyzed pursuant to section 783.2, and, if so, whether feasible alternatives or feasible mitigation measures would avoid or substantially lessen any such significant adverse effects. In such cases, each application shall include an analysis of all potentially significant adverse environmental effects which may result from the project or activity, and either (1) a discussion of feasible alternatives and feasible mitigation measures to avoid or substantially lessen any significant adverse environmental effects or (2) a statement that, because the applicant's analysis of the proposed project showed that the proposed project would not have any significant or potentially significant effects on the environment, no alternatives or mitigation measures are proposed to avoid or substantially lessen significant effects on the environment. This statement shall be supported by documentation describing the potential effects examined in reaching this conclusion. If the analysis identifies significant adverse environmental effects for which feasible mitigation measures are not available, it shall also include a statement describing any specific environmental, economic, legal, social, technological, or other benefits which might justify the significant environmental effects of the project or activity. The analysis and information required by this section shall be provided to the Department as soon as reasonably practicable following the submission of a permit application.

Authority: Fish and Game Code sections 702 and 2081 (d), Public Resources Code section 21080.5.

Reference: Fish and Game Code section 208 I (b), Public Resources Code sections 21002.1, 21069, 21080.1, 21080.3, 21080.4, 21080.5, 21165.

783.4 Incidental Take Permit Review Standards.

(a) Issuance criteria. If an application is submitted in accordance with section 783.2 and section 783.3, the Director shall decide whether or not an incidental take permit should be issued. A permit may only be issued if the Director finds that:

(1) The take authorized by the permit will be incidental to an otherwise lawful activity.

(2) The applicant will minimize and fully mitigate the impacts of the take authorized under the permit. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.

(3) The permit will be consistent with any regulations adopted pursuant to Fish and Game Code Sections 2112 and 2114.

(4) The applicant has ensured adequate funding to implement the measures required under the permit to minimize and fully mitigate the impacts of the taking, and to monitor compliance with, and the effectiveness of, the measures.

(b) No incidental take permit shall be issued pursuant to this article if issuance of the permit would jeopardize the continued existence of the species. The Department shall make this determination based on the best scientific and other information that is reasonably available, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of

(1) known population trends;

(2) known threats to the species; and

(3) reasonably foreseeable impacts on the species from other related projects and activities.

(c) Permit conditions. Every permit issued under this article shall contain such terms and conditions as the Director deems necessary or appropriate to meet the standards in this section. In determining whether measures are capable of successful implementation, the Director shall consider whether the measures are legally, technologically, economically and biologically practicable. This

provision does not preclude the use of new measures or other measures without an as yet established record of success which have reasonable basis for utilization and a reasonable prospect for success.

Authority: Fish and Game Code sections 702 and 2081(d).

Reference: Fish and Game Code sections 2081(b) and (c).

783.5 Incidental Take Permit Process.

(a) The Director shall review and render a decision regarding incidental take permit applications in accordance with this section. On-site inspections by the Department may be required prior to a final decision by the Director.

(b) Initial review. The Department shall complete an initial review of each incidental take permit application within 30 days of receipt. If the Department determines that the application is complete, it shall notify the applicant that the application has been accepted and shall commence review of the permit application in accordance with section 783.5(c) or section 783.5(d), as applicable. This determination shall be based solely on whether the applicant has provided information responsive to each required element of sections 783.2 and 783.3 and shall not be based on the merits of the application. If an incomplete or improperly executed application is submitted, the Department shall return the application to the applicant with a description of the deficiency. The applicant shall have 30 days from receipt of the returned application to correct the deficiency and re-submit the application. If the Department takes no action within 30 days of receipt, the application shall be deemed complete. The Department may require supplementary information during the application review process after the application is determined to be complete, or is deemed complete, pursuant to this subsection.

(c) Department as CEQA responsible agency. If the Department is a responsible agency for purposes of CEQA, the Department shall act in accordance with California Code of Regulations, title 14, section 15096 and other applicable provisions of CEQA and the CEQA Guidelines, California Code of Regulations, title 14, section 15000, et seq.. The Director shall decide whether an incidental take permit can be issued under this article, in accordance with CEQA and the CEQA Guidelines, based on a review of the application; the environmental impact report, mitigated negative declaration or negative declaration, or other environmental documentation prepared pursuant to a regulatory program certified pursuant to Public Resources Code section 21080.5 (and listed in title 14, California Code of Regulations, section 1525 1), prepared by the lead agency; the lead agency's findings under Section 21081 of the Public Resources Code; and any other available, relevant information included in the record by the Department.

(1) **If** the Department determines that it will not proceed with any of the actions specified in California Code of Regulations, title 14, section 15096(e), the Director shall approve the application and issue a permit, or deny an application, in accordance with this article as soon as possible and no later than the latest of the following dates:

(A) 90 days from the date on which the lead agency approved the activity. However, the Department shall, at the request of the applicant, commence processing the application as soon as the information necessary to commence the processing is available.

(B) 90 days from the date on which the application was accepted as complete by the Department.

(C) If the Department makes a written finding that additional time is necessary due to the complexity of the application or the scope and duration of the requested permit, the 90 day periods for acting upon the permit application may be extended an additional 60 days to a total of 150 days.

(2) If the Director decides to approve the application, the Director shall make findings substantiating compliance with section 783.4 and shall make the findings required of a CEQA responsible agency under California Code of Regulations, title 14, section 15096(h). The Director shall then issue the incidental take permit. Within five working days after the issuance or amendment of a permit, the Department shall file a notice of determination under California Code of Regulations, title 14, section 15096(i).

(3) If the Director decides to deny the application, the Director shall return the application to the applicant with a written statement of the basis for the denial and a description of any measures the Director deems necessary in order for the application to be approved.

(d) Department as lead agency. If the Department is the lead agency under CEQA for purposes of issuing an incidental take permit, the application shall be reviewed, and approved or denied in accordance with this subsection. The Director shall approve an application and issue a permit, or deny the application, under this subsection no later than 120 days from the date on which the completed application is accepted as complete by the Department; provided, however, that the Department may extend this time to no later than 180 days from the date the application is accepted upon a written finding that the extension is necessary due to the complexity of the application or the scope and duration of the requested permit.

(1) Review of environmental analysis. After accepting a completed application, the Department shall review the analysis submitted by the applicant pursuant to section 783.3 and make any revisions that the Director deems necessary or appropriate to comply with CEQA.

(2) Notice of Public Availability of application.

(A) Public review and comment. Once the Department has reviewed and revised the analysis, it shall make the application and analysis available for public review at the headquarters of the region in which the application was submitted and shall distribute copies of a Notice of Public Availability. A minimum of 30 days following distribution of the Notice of Public Availability shall be allowed for public review and comment regarding the application. The Notice of Public Availability shall include the following:

- I. the name of the applicant;
2. a brief description of the project or activity for which the permit is sought and its location;
3. the common and scientific names of the species to be covered by the permit;

4. the date on which the Department accepted the application;
5. a description of how copies of the application and analysis can be obtained;
6. the name and telephone number of a contact person within the Department who can answer questions regarding the application; and
7. a statement that the Department seeks written comments from the public regarding the application and analysis, an address to which the comments should be sent, and the deadline for submission of the comments.

(B) Distribution of notice. Copies of the Notice of Public Availability shall be distributed as follows:

1. A copy shall be sent to the office of the County Clerk of the county in which the proposed project or activity would take place and, if applicable, to the planning department of the city with jurisdiction over the project or activity, for posting at the customary place for posting environmental matters.
2. If the Director determines that the proposed project or activity is of Statewide significance, a copy shall be filed with the Office of Planning and Research.
3. A copy shall be sent to any other person upon written request.
4. Copies of the Notice of Public Availability may also be posted or made available at such other locations as the Director deems desirable and feasible to provide adequate public notice.

(3) Consultation. Concurrent with the distribution of the Notice of Public Availability, the Department shall consult with, and request written comments from, all public agencies with jurisdiction by law over the project or activity for which the permit is sought.

(4) Response to comments. The Department shall prepare a written summary and response to all significant environmental points raised during review of the application.

(5) Issuance of permit. The Director's decision regarding the application shall be based on the application and analysis, the written summary and response to significant environmental points, and any other available, relevant information included in the record by the Department. The Director shall determine whether or not to issue an incidental take permit pursuant to this article and, in addition, shall determine whether the project or activity, as proposed, may result in any significant adverse environmental effects in addition to the impacts of taking species to be covered by the permit, and, if so, whether feasible alternatives or feasible mitigation measures would avoid or substantially lessen any significant adverse effects. The Director shall not approve the application, as proposed, if there are feasible mitigation measures or alternatives which would substantially reduce any significant adverse effects. If significant adverse effects will likely result even after the inclusion of feasible mitigation measures or alternatives, the Director may approve the application if the Director first

makes findings in accordance with the provisions of Section 21081 of the Public Resources Code.

(A) If the Director decides to approve the application, the Director shall make findings substantiating compliance with section 783.4 and this subsection (d)(5). The Director shall then issue the incidental take permit.

(B) If the Director decides to deny the application, the Director shall return the application to the applicant with a written statement of the basis for the permit denial and a description of any measures the Director deems necessary in order for the application to be approved.

(6) Notice of decision. Within five working days of issuing an incidental take permit or denying an application under this subsection (d), the Director shall file a Notice of Decision, which indicates whether the proposed permit will, or will not, have a significant effect on the environment, with the Secretary of the Resources Agency. The Notice of Decision shall include a statement that the Director approved the application and has issued an incidental take permit, or that the Director denied the application.

Authority: Fish and Game Code sections 702 and 2081 (d), Public Resources Code section 21080.5.

Reference: Fish and Game Code section 2081 (b); Public Resources Code sections 21002.1, 21069, 21080.1, 21080.3, 21080.4, 21080.5, 21165.

783.6 General Permit Conditions.

The following provisions apply to all permits issued under this article.

(a) Assignment or transfer of permit.

(1) Except as provided in subsection (a)(2) below, no incidental take permit shall be assigned or transferred without the written consent of the Department, which shall not be unreasonably withheld.

(2) With written notice to the Department, any permit may be assigned or transferred without the approval of the Department in the following circumstances:

(A) The sale, merger, annexation, consolidation or other acquisition of an institutional, corporate or public entity permit holder by another entity.

(B) The transfer of a permit from a natural person to the institutional, corporate, or public employer of such individual.

(C) As security for a debt under the provision of any mortgage, deed of trust, indenture, bank credit agreement, or similar instrument.

(b) Renewal of permits.

(1) Applicants for renewal must submit a written application to the Regional Manager

at least 60 days prior to the expiration date of the permit. Applicants must certify in writing that all statements and information in the original application remain current and correct, unless previously changed or corrected. If the information is no longer current or correct, the applicant must provide corrected information.

(2) Renewal criteria. The Director shall renew a permit if the application meets the standards in section 783.4.

(3) Continuation of permitted project or activity. Any person holding a valid, renewable, incidental take permit who has submitted a timely application for renewal, may continue the activities authorized by the expired permit until the Director has acted on such person's application for renewal.

(c) Amendment of permit.

(1) Permittee's request. Where circumstances have changed so that a permittee desires to have any condition of a permit modified, such permittee must submit an application and supporting information in conformity with this article.

(2) Department amendments. The Department may amend any permit at any time during its term with the concurrence of the permittee, or as required by law. The Department shall amend a permit as required by law regardless of whether the permittee concurs with such amendment.

(3) Change of name or address. A permittee is not required to amend a permit or obtain a new permit if there is a change in the legal individual or business name, or in the mailing address of the permittee. A permittee is required to notify the Regional Manager within 10 calendar days of such change. This provision does not authorize any change in location of the conduct of the permitted project or activity when approval of the location is a qualifying condition of the permit.

(4) Minor permit amendments. Amendments that would not significantly modify the scope or nature of the permitted project or activity or the minimization, mitigation or monitoring measures in an incidental take permit, as determined by the Department, shall be considered minor permit amendments. Minor permit amendments shall be approved and incorporated into the incidental take permit, or denied, by the Director within 60 days of the permittee's submission of an application for amendment. If the Director approves a minor permit amendment, the Department shall not impose any new permit condition or modify any existing permit condition except when the new or modified condition:

(A) relates solely to the minor permit amendment,

(B) is required by changes in the law, or

(C) is needed to make existing permit conditions consistent with the proposed amendment.

(5) Major permit amendments. Amendments that would significantly modify the scope or nature of the permitted project or activity or the minimization, mitigation or monitoring measures in an incidental take permit, or require additional environmental review pursuant to Public

Resources Code, section 21166, or California Code of Regulations, title 14, section 15162, as determined by the Department, shall be considered major permit amendments. Requests for major permit amendments shall be reviewed according to the process established for initial permit applications, except that the information and analysis provided in support of an application for a major permit amendment may rely on and supplement the information and analysis used in the initial permit application.

(6) Approval standard. The Director shall approve any minor or major permit amendment if the amended permit would continue to meet the standards in section 783.4.

(d) Alteration of permit. Permits shall not be altered, erased, or mutilated, and any permit which has been altered, erased, or mutilated shall immediately become invalid.

(e) Display of permit. Permits shall be displayed for inspection upon request by the Director or the Director's agents.

(f) Surrender of permit. Any person holding a permit shall surrender such permit to the Department upon notification that the permit has been suspended or revoked and all appeal procedures have been exhausted.

Authority: Fish and Game Code sections 702 and 2081(d).

Reference: Fish and Game Code section 2081 (b).

783.7 Permit Suspension and Revocation.

(a) Criteria for suspension. The privileges of exercising some or all of the permit authority may be suspended at any time if the permittee is not in compliance with the conditions of the permit. Any action to suspend any privileges under an incidental take permit shall be limited so as to address the discrete action or inaction that has resulted in the suspension, to the extent consistent with the species protection purposes of the permit.

(b) Criteria for revocation. The Director may begin procedures to revoke a permit if the permittee fails within 60 days of written notification pursuant to subsection (c)(3) to correct deficiencies that were the cause of a permit suspension, or if statutory enactments subsequent to the issuance of the permit prohibit the continuation of the permit or the project or activity covered by the permit. Any action to revoke any privileges under an incidental take permit shall be limited so as to address the discrete action or inaction, or statutory enactment, that has resulted in the revocation, to the extent consistent with the species protection purposes of the permit.

(c) Procedure for suspension or revocation.

(1) When the Director believes there are valid grounds for suspending or revoking a permit the permittee shall be notified in writing of the proposed suspension or revocation by certified or registered mail. In no case shall a proposed revocation notice be issued prior to the 60 day period required by subsection (b). The notice shall identify the permit to be suspended or revoked, the reason(s) for such suspension or revocation, the actions necessary to correct the deficiencies, and inform the permittee of the right to object to the proposed suspension or revocation. The Department

may amend any notice of suspension or revocation at any time.

(2) Upon receipt of a notice of proposed suspension or revocation the permittee may file a written objection to the proposed action. Such objection must be in writing, must be filed within 45 calendar days of the date of the notice of proposal, must state the reasons why the permittee objects to the proposed suspension or revocation, and may include supporting documentation.

(3) A decision on the proposed suspension or revocation shall be made within 45 days after the end of the objection period. The Department shall notify the permittee in writing of the Director's decision and the reasons therefor. The Department shall also provide the applicant with the information concerning the right to request reconsideration of the decision under section 783.8 of this article and the procedures for requesting reconsideration. No permit may be revoked pursuant to this section unless it has first been suspended pursuant to this section. The permit shall remain valid and effective pending any final determination on suspension under this subsection, except that a permit may be suspended immediately if statutory enactments subsequent to the issuance of the permit prohibit the continuation of the permit or the project or activity covered by the permit.

Authority: Fish and Game Code sections 702 and 2081 (d).

Reference: Fish and Game Code section 2081(b).

783.8 Reconsideration and appeal procedures.

(a) Request for reconsideration. Any person may request reconsideration of an action under this article if that person is one of the following:

(1) An applicant for permit issuance, renewal or amendment who has received written notice of denial;

(2) A permittee who has a permit amended, suspended, or revoked; or

(3) A permittee who has a permit issued, renewed, or amended but has not been granted authority by the permit to perform all activities requested in the application; or the permit includes minimization or mitigation measures other than those proposed by the applicant.

(b) Method of requesting reconsideration. Any person requesting reconsideration of an action under this article must comply with the following criteria:

(I) Any request for reconsideration must be in writing, signed by the person requesting reconsideration or by the legal representative of that person, and must be submitted to the Regional Manager.

(2) The request for reconsideration must be received by the Regional Manager within 30 days of the date of notification of the decision for which reconsideration is being requested.

(3) The request for reconsideration shall state the decision for which reconsideration is being requested and shall state the reason(s) for the reconsideration, including presenting any new

information or facts pertinent to the issue(s) raised by the request for reconsideration.

(4) The request for reconsideration shall contain a certification in substantially the same form as provided in section 783.2(a)(11). If a request for reconsideration does not contain such certification, but is otherwise timely and appropriate, it shall be held and the person submitting the request shall be given written notice of the need to submit the certification within 15 days. Failure to submit certification shall result in the request being rejected as insufficient in form and content.

(c) Inquiry by the Department. The Department may institute a separate inquiry into the matter under consideration.

(d) Determination of grant or denial of a request for reconsideration. The Department shall notify the permittee of its decision within 45 days of the receipt of the request for reconsideration. This notification shall be in writing, shall state the reasons for the decision, and shall contain a description of the evidence which was relied upon by the issuing officer, The notification shall also provide information concerning the right to appeal and the procedures for making an appeal.

(e) Appeal. A person who has received an adverse decision following submission of a request for reconsideration may submit a written appeal to the Director. An appeal must be submitted within 30 days of the date of the notification of the decision on the request for reconsideration. The appeal shall state the reason(s) and issue(s) upon which the appeal is based and may contain any additional evidence or arguments to support the appeal.

(f) Decision on appeal.

(I) Before a decision is made concerning the appeal, the appellant may present oral arguments before the Director if the Director judges oral arguments are necessary to clarify issues raised in the written record.

(2) The Director shall notify the appellant in writing of his or her decision within 30 calendar days of receipt of the appeal, unless extended for one additional 30-day period for good cause and the appellant is notified of the extension.

(3) The decision of the Director shall constitute the final administrative decision of the Department.

Authority: Fish and Game Code sections 702 and 2081(d).

Reference: Fish and Game Code section 2081(b).

EXHIBIT F

AB 1986

Assembly Bill No. 1986

CHAPTER 615

An act relating to forest resources, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 19, 1998. Filed with Secretary of State September 21, 1998.]

On this date I have signed Assembly Bill No. 1986 with a reduction.

This bill would appropriate \$245.5 million General Fund for the acquisition of the Headwaters Forest Preserve and related properties. This bill also specifies the **conditions** under which the funds could be encumbered, including specific requirements for the related Habitat Conservation Plan and implementation of a federal watershed study.

I am signing AB 1986, however, I am reducing the appropriation by a total of three million dollars (\$3,000,000) from Section 1 (b) , which allocates fifteen million dollars (\$15,000,000) to Humboldt County for economic assistance.

The remaining twelve million dollars (\$12,000,00) included in the bill plus the five million (\$5,000,000) allocated by federal government for, economic development should provide adequate assistance to Humboldt County for this purpose.

PETE WILSON, Governor

LEGISLATIVE COUNSEL'S DIGEST

AB 1986, Migden. Headwaters Forest, Owl Creek, and Grizzly Creek: appropriation.

economic assistance, up to \$20,000,000 for allocation to the board for the purchase of the Grizzly Creek Marbled Murrelet Conservation Area, and \$500,000 for allocation to the board for administrative expenses and costs related to the acquisition of those properties.

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The bill would declare that it is to take effect immediately as my urgency statute.

Appropriation: yes.

The people of the State of California. do enact as follows:

SECTION 1. (a) The sum of two hundred forty-five million five hundred thousand dollars (\$245,500,000) is hereby appropriated to the Controller from the General Fund for allocation in accordance with subdivision (b) and Sections 2 and 5 of this act.

(b) Of the funds appropriated by this section fifteen million dollars (\$15,000,000) shall be available for economic assistance for the County of Humboldt, up to \$20,000,000 shall be allocated to the Wildlife Conservation Board and be available for the purchase at fair market value of the Grizzly Creek Marbled Murrelet Conservation Area, and up to five hundred thousand dollars (\$500,000) shall be available to the Wildlife Conservation Board for expenditure for administrative expenses and costs related to the acquisition of properties authorized by this act.

(C) Notwithstanding any Other provision of law;

(1) Funds appropriated pursuant to subdivision (a) for the purposes of Sections 2 and 3 of this act shall only be available until July 1, 1999, and as of that date shall revert to the **General Fund**.

(2) Funds appropriated pursuant to subdivision (a) for the purposes of **Section 5** of this act shall only be available from July 1 1999, until June 30, 2001, and as of that date shall revert **to** the General Fund.

(d) Funds appropriated pursuant to subdivision (a) shall be encumbered only if the United States Government has encumbered two hundred fifty million dollars (\$250,000,000) as matching funds in fulfillment of the agreement dated September 28, 1996, among the United States of America the State of California, MAXXAM Inc., and the Pacific Lumber Company, and any subsequent agreements adopted pursuant thereto.

SEC. 2. (a) Of the funds appropriated by. Section 1 of this act one hundred thirty million dollars (\$130,000,000) is to be allocated to the, Wildlife Conservation Board, subject **to** the conditions established pursuant to Section **3** of this act, for expenditure, notwithstanding Section 13340 of the Government Code, without regard to fiscal years, to acquire the lands referenced in the Agreement dated September 28, 1996, which consist of approximately 4,500 acres commonly referred to as the Headwaters Forest, approximately 1,125 acres referred to as the Elk Head Forest, and **approximately 9,600** acres referred to as the Elk River Property, which are located in the County of Humboldt, California for the purposes of **consummating** the Agreement dated September 28, 1996.

(b) This section is intended to provide the sole authority for the acquisition of the property, referenced in subdivision (a), that is the subject of, the Agreement dated September 28, 1996, between the United States of America (hereafter, United States), the State of California, MAXXAM, Inc., and the Pacific Lumber Company (hereafter, Company). Of the entire Elk River Property, the United States and the State of California are to receive approximately 1,845 acres and the remaining approximately 7,755 acres of Elk River Property is to be transferred to the Company. The property to be acquired by the United States and the State of California is that property that is the subject of the Agreement dated September 28, 1996, as generally depicted on maps labeled as sheets 1 through 7 of Township 3 and 4 North, Ranges 1 East and 1 West, of the Humboldt Meridian, California, titled "Dependent Resurvey and Tract Survey," as approved by Lance J. Bishop, Chief Cadastral Surveyor, Bureau of Land Management, Sacramento, California. The land acquired by the United States and the State of California, which consists of approximately 7,470 acres, shall hereafter be known as the Headwaters Forest Preserve.

SEC. 3. Notwithstanding any other provision of law, funds appropriated by this act shall only be encumbered by the board if the final habitat conservation plan (hereafter "final HCP"), implementing agreement, and permits to allow the incidental take of threatened and endangered species, the drafts of which are more fully described in the notice published in the Federal Register on July 7, 1998 (hereafter "Draft Habitat Conservation Plan" or "Draft HCP") incorporate, at minimum, the following additional conditions and the final HCP is no less protective of aquatic or avian species than the draft HCP, amended by those conditions:

(a) The final HCP shall establish a no-cut buffer of 100 feet on each side of each class 1 watercourse until all of the following conditions are met:

(1) The watershed analysis process described in the draft HCP has been completed for that watercourse, and the watershed assessment has been reviewed by the United States Fish and Wildlife Service and the United States National Marine Fisheries Service;

(2) The United States Fish and Wildlife Service or the National Marine Fisheries Service have established site-specific prescriptions for that watercourse. If the United States Fish and Wildlife Service or the United States National Marine Fisheries Service establish site-specific prescriptions that differ from prescriptions proposed in the watershed assessment, the agency shall state in writing its reasons for doing so.

(3) The site-specific prescriptions established by the United States Fish and Wildlife Service or the National Marine Fisheries Service have been implemented on that watercourse,

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(b) The final HCP shall establish a no-cut buffer of 30 feet on each side of each class 2 watercourse, which shall remain in effect until all of the following conditions are met:

(1) The watershed analysis process described in the draft HCP has been completed for that watercourse, and the watershed assessment has been reviewed by the United States Fish and Wildlife Service and the United States National Marine Fisheries Service.

(2) The United States Fish and Wildlife Service or the National Marine Fisheries Service have established site-specific prescriptions for that watercourse.

(3) The site-specific prescriptions established by the United States Fish and Wildlife Service or the National Marine Fisheries Service have been implemented on that watercourse. If the United States Fish and Wildlife Service or the United States National Marine Fisheries Service establish site-specific prescriptions that differ from prescriptions proposed in the watershed assessment, either of those services shall state in writing its reasons for doing so.

(c) Except as provided in subdivisions (a), (b), (d), and (j), the final HCP shall establish all those restrictions on class 1, 2, and 3 watercourses contained in the January 7, 1998, document entitled "Corrected Version Draft--Interagency Federal-State Aquatic Strategy and Mitigation for Timber Harvest and Roads for the Pacific Lumber Company," which shall remain in effect until all of the following conditions are met:

(1) The watershed analysis process described in the draft HCP has been completed for each watercourse, and the watershed assessment has been reviewed by the United States Fish and Wildlife Service and the United States National Marine Fisheries Service.

(2) The United States Fish and Wildlife Service or the National Marine Fisheries Service have established site-specific prescriptions for each watercourse.

(3) The site-specific prescriptions established by the United States Fish and Wildlife Service or the National Marine Fisheries Service have been implemented on that watercourse. If the United States Fish and Wildlife Service or the United States National Marine Fisheries Service establish site-specific prescriptions that differ from prescriptions proposed in the watershed assessment, the agency shall state in writing its reasons for doing so.

(d) The final HCP shall require that any site-specific prescriptions that are established by the United States Fish and Wildlife Service or the National Marine Fisheries Service, upon completion of the watershed analysis, shall be implemented by the Company so that those prescriptions result in a no-cut buffer of not less than 30 feet, and not more than 170 feet, on each side of each class 1 and class 2 watercourse. However, with respect to the minimum 30 foot no-cut buffer on Class 2 watercourses, the United States Fish and Wildlife Service or the United States National Marine Fisheries Service may

adjust the buffer if it determines that it will benefit aquatic habitat or species. However, in no event may the minimum 30 foot no-cut buffer be less than that distance established under the draft HCP.

(e) The final HCP shall provide that the United States Fish and Wildlife Service and the United States National Marine Fisheries Service, in consultation with the Department of Forestry and Fire Protection, the regional water quality control board, and the Department of Fish and Game, shall develop a peer review process to evaluate, on a spot-check basis, the appropriateness of completed analyses and prescriptions that are developed through the watershed analysis process.

(f) The final HCP shall provide that the Company, in consultation with the National Marine Fisheries Service and the United States Fish and Wildlife Service, shall establish a schedule that results in completion of the watershed analysis process with five years.

(g) The final HCP shall prohibit timber harvesting, including salvage logging and other management activities that are detrimental to the marbled murrelet or marbled murrelet habitat in the Marbled Murrelet Conservation Areas for the life of the incidental take permits, as defined in the February 27, 1998, document entitled "Pre-Permit Application Agreement in Principle" that are in effect in the following tracts of remnant and residual ancient forest that are depicted in the map titled "Murrelet Conservation Areas" that is on file in the office of the Secretary of the Resources Agency:

(i)	Elk Head Residual	564 acres
(ii)	Cooper Mill	722 acres
(iii)	Allen Creek	1,421 acres
(iv)	Allen Creek Extension	301 acres
(v)	Road 3	659 acres
(vi)	Owl Creek	904 acres
(vii)	Shaw Gift	548 acres
(viii)	Right Road 9	322 acres.
(ix)	Road 7 and 9 North	501 acres
(x)	Booth's Run	776 acres
(xi)	Bell Lawrence	634 acres
(xii)	Lower North Fork Elk	531 acres

(h) The acreages established pursuant to subdivision (g) may be adjusted by the United States Fish and Wildlife Service or the United States National Marine Fisheries Service, provided that the adjustments are made to more accurately describe Marbled Murrelet habitat. However, in no event shall the acreages be any less than those acreages established pursuant to the draft HCP.

(i) The final HCP shall prohibit the Company from timber harvesting, including salvage logging and other management activities, in the tract identified as the "Grizzly Creek Marbled Murrelet Conservation Area," as depicted on the map titled "Murrelet Conservation Areas," which is on file in the Office of the Secretary of the Resources Agency, for five years from the date of adoption of the final HCP to provide an opportunity for the purchase, and permanent protection of, that tract.

(j) The final HCP shall impose conditions on road-related activities that, on balance, are no less protective of species and habitat than the provisions contained in the February 27, 1998, document entitled "Pie-Permit Application Agreement in Principle."

(k) The final HCP shall require that the company shall submit all timber harvesting plans covering lands that are subject to the final HCP and the incidental take permit for review and comment, and for a finding as to whether or not the timber harvesting plan is consistent with the Final HCP, to the United States National Marine Fisheries Service and the United States Fish and Wildlife Service at least 30 days prior to the earliest possible date of the timber harvesting plan approval by the Department of Forestry and Fire Protection. Nothing in this section shall affect the authority of the Department of Forestry and Fire Protection to approve or disapprove timber harvesting plans under state or federal law.

(l) The Legislature finds and declares the following:

(1) The final approval or disapproval of the draft HCP is exclusively within the jurisdiction of federal law and those agencies that implement federal law.

(2) It is the intent of the Legislature in authorizing the expenditure of funds pursuant to Section 2 of this act, and in establishing conditions on the use of those funds pursuant to this section, that the final HCP approved by the United States Fish and Wildlife Service and the National Marine Fisheries Service will incorporate the conditions set forth in this section and not be any less protective of aquatic or avian species than the provisions of this section.

SEC. 4. The sustained yield plan and any subsequent sustained

of aquatic or avian species than the provisions of this act. Nothing in this section shall be construed as requiring the Department of Forestry and Fire Protection to make any additional findings relative to timber harvest plans pursuant to this section, other than those findings that are already required the law as it read on the effective date of this act.

SEC. 5. (a) Of the funds-appropriated by Section 1 of this act, up to eighty million dollars (\$80,000,000) is to be allocated to the Wildlife Conservation Board for expenditure by the board, effective July 1, 1999, notwithstanding Section 13340 of the Government Code, without regard to fiscal year, and subject to compliance with the conditions established pursuant to Section 3 and 4 of this act, to be applied to the purchase price of purchasing for fair market value the area identified as "Owl Creek" (MMCA) in the draft Habitat Conservation Plan submitted by Pacific Lumber Company, dated July 1998, as part of completing the Headwaters Agreement of September 28, 1996. To the extent funds allocated pursuant to this section remain after: the purchase of the "Owl Creek" Tract, those funds may be reappropriated for the acquisition, at fair market value, of the tracts known as the "Elk River Property" and the previously unlogged ancient Douglas Fir forestland with the Mattole River watershed,

(1) The Wildlife Conservation Board is hereby authorized to purchase for its fair market value the tract of land identified in subdivision (a) as "Owl Creek".

(2) The Wildlife Conservation Board shall undertake an appraisal of the tract of land described in paragraph (1) to determine its fair market value. The appraisal shall be conducted by three qualified appraisers to be selected as follows:

(A) One appraiser selected by the Pacific Lumber Company.

(B) One appraiser selected by the board:

(C) One appraiser selected by the appraisers selected pursuant to subparagraphs (A) and (B).

(b) At the option of the Pacific Lumber Company, the appraisal methodology may assume the issuance of all necessary permits and approvals for the management of the "Owl Creek" tract as described in the tract HCP, including incidental take permits under the California and federal endangered species acts

(c) On or before July 1, 2000, the Wildlife Conservation Board shall make a good faith offer to the Pacific Lumber Company for the purchase of the "Owl Creek" Tract.

(d) The Legislature finds and declares that the appropriation and allocation of funds for the purposes of subdivision (a) is intended to demonstrate a good faith commitment on the part of the state to purchase the Owl Creek tract. The Legislature further finds and declares that the Wildlife Conservation Board shall undertake all

feasible efforts to obtain private and nonprofit funding to assist in this purchase.

(d) This section shall remain in effect until July 1, 2001, and as of that date is repealed unless a later enacted statute, that is enacted before July 1, 2001, extends or repeals that date.

SEC. 6. The provisions of this act shall not, in any way, be construed to create any precedent or requirement that would be applicable to any other future timber harvest plan, sustained yield plan, habitat conservation plan, or to otherwise restrict or prohibit any other activity affecting forest resources that is currently permitted under state law other than those plans or activities that are subject to the requirements of this act.

SEC. 7. The provisions of this act are severable. If any provision of this or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to facilitate the acquisition of the Headwaters Forest pursuant to the September 28, 1996, agreement between the Pacific Lumber Company, the United States, and the State of California at the earliest possible time, thereby permanently preserving in public ownership the largest intact stand of ancient redwoods left in private ownerships, it is necessary that this act take effect immediately.

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
600.501	-0089
600.502	-0075
600.503	-0305 and -0306
600.504	-0075
600.506	-0075
600.507	-0075
600.508	-0329
600.510	-0075
600.512	-0309
600.520	-0075
600.630	-0314
622.4	-0205 and -0336
622.5	-0013 and -0016
622.6	-0305 and -0306
622.8	-0205
622.15	-0013 and -0262
622.17	-0205
622.40(a)(2)	-0205
622.41(a)	-0016, and -0305
622.45(a)	-0013
630.4	-0205
630.5	-0013 and -0016
630.6	-0306
630.10	-0016
630.31	-0277
640.4	-0205
640.6	-0305 and -0306
644.24	-0216
648.4	-0202 and -0212
648.5	-0202
648.6	-0202
648.7	-0018, -0212, and -0229
648.8	-0306, -0229
648.9	-0202 and -0307
648.10	-0202
648.11	-0202
648.15	-0202
648.53	-0202
648.54	-0202
648.56	-0321
648.70	-0238
648.74	-0240
648.80	-0202
648.81	-0202
648.82	-0202
648.84	-0305
648.86	-0202
648.100	-0202
648.106	-0202
648.123	-0305
648.144	-0305
649.4	-0202
649.5	-0202
649.6	-0202
649.7	-0306
649.21	-0305
654.6	-0305, -0306, and -0307
660.13	-0204
660.14	-0214
660.16	-0306
660.17	-0204
660.21(a)	-0204
660.23	-0214
660.24	-0305
660.25	-0307
660.27	-0214
660.28	-0214
660.43	-0214
660.46	-0214
660.303	-0271
660.305	-0306

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
660.322	-0305
660.323	-0243
660.333	-0203
660.505	-0306
661.4	-0222
661.20	-0222
663.4	-0271
663.6	-0306
663.10	-0203
663.11	-0203
663.22	-0305
663.33	-0203
678.4	-0205
678.5	-0013, -0016 and -0229
678.6	-0306
678.10	-0016
679.4	-0206, -0272, -0280, and -0282
679.5	-0213 and -0272
679.6	-0206
679.24	-0305 and -0307
679.25	-0316
679.30	-0269
679.32	-0269
679.33	-0269
679.34	-0269
679.40	-0213 and -0272
679.41	-0272
679.42	-0272
679.43	-0272 and -0282
679.50	-0307 and -0318

¹ And -0305.

[60 FR 39248, Aug. 2, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §902.1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

EFFECTIVE DATE NOTE: At 62 FR 1831, Jan. 14, 1997, in §902.1, in paragraph (b), the table was amended by adding the entry "648.56", effective Feb. 13, 1997 through July 15, 1998.

PART 903—PUBLIC INFORMATION

AUTHORITY: 5 U.S.C. 552 as amended by Pub. L. 93-502; 5 U.S.C. 553; Reorg. Plan No. 2 of 1965, 15 U.S.C. 311 note; 32 FR 9734, 31 FR 10752.

§903.1 Access to information.

The rules and procedures regarding public access to the records of the National Oceanic and Atmospheric Administration are found at 15 CFR part 4.

[57 FR 35749, Aug. 11, 1992]

PART 904—CIVIL PROCEDURES

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- 904.3 Filing and service of documents.

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- 904.104 Final administrative decision.
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- 904.106 Compromise of civil penalty.
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POST-HEARING

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- 904.261 Post-hearing briefs.
- 904.262 Documents, copies, and exhibits.

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- 904.505 Summary sale.
- 904.506 Remission and mitigation of forfeiture.
- 904.507 Petition for restoration of proceeds.
- 904.508 Recovery of certain storage costs.
- 904.509 Abandonment.
- 904.510 Disposal of forfeited or abandoned items.

AUTHORITY: 16 U.S.C. 1801-1882; 16 U.S.C. 1531-1543; 16 U.S.C. 1361-1407; 16 U.S.C. 3371-3378; 16 U.S.C. 1431-1439; 16 U.S.C. 773-778k; 16 U.S.C. 951-961; 16 U.S.C. 1021-1032; 16 U.S.C. 3631-3644; 42 U.S.C. 9101 *et seq.*; 30 U.S.C. 1401 *et seq.*; 16 U.S.C. 971-9711; 16 U.S.C. 781 *et seq.*; 16 U.S.C. 2401-2412; 16 U.S.C. 2431-2444; 16 U.S.C. 972-972h; 16 U.S.C. 916-9161; 16 U.S.C. 1151-1175; 16 U.S.C. 3601-3608; 16 U.S.C. 1851 note; 15 U.S.C. 4201 *et seq.*; Pub. L. 102-587, 106 Stat. 5039.

SOURCE: 52 FR 10325, Mar. 31, 1987, unless otherwise noted.

Subpart A—General

§904.1 Purpose and scope.

(a) This part sets forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property.

(b) This subpart defines terms appearing in the part and sets forth rules for the filing and service of documents in administrative proceedings covered by this part.

(c) The following statutes authorize NOAA to assess civil penalties, impose permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of those statutes:

- (1) Antarctic Conservation Act of 1978, 16 U.S.C. 2401-2412;
- (2) Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431-2444;
- (3) Atlantic Salmon Convention Act of 1982, 16 U.S.C. 3601-3606;
- (4) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851 note;
- (5) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971i;
- (6) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 *et seq.*;
- (7) Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972-972h;
- (8) Endangered Species Act of 1973, 16 U.S.C. 1531-1543;
- (9) Fur Seal Act Amendments of 1983, 16 U.S.C. 1151-1175;
- (10) Lacey Act Amendments of 1981, 16 U.S.C. 3371-3378;
- (11) Land Remote-Sensing Commercialization Act of 1981, 15 U.S.C. 4201 *et seq.*;
- (12) Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882;
- (13) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407;
- (14) Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. 1431-1439;
- (15) Northern Pacific Halibut Act of 1982, 16 U.S.C. 773-773k;
- (16) North Pacific Fisheries Act of 1954, 16 U.S.C. 1021-1032;
- (17) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.*;

- (18) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631-3644;
- (19) Sponge Act, 16 U.S.C. 781 *et seq.*;
- (20) Tuna Conventions Act of 1950, 16 U.S.C. 951-961; and
- (21) Whaling Convention Act of 1949, 16 U.S.C. 916-916f.

The procedures set forth in this part are intended to apply to administrative proceedings under these and later-enacted statutes administered by NOAA.

§904.2 Definitions.

Unless the context otherwise requires, or as otherwise noted, terms in this part have the meanings prescribed in the applicable statute or regulation. In addition, the following definitions apply:

Administrator means the Administrator of NOAA or a designee.

Agency means the National Oceanic and Atmospheric Administration (NOAA).

Applicable statute means a statute cited in §904.1(c), and any regulations issued by NOAA to implement it.

Applicant means any person who applies or is expected to apply for a permit.

Citation means a written warning (see section 311(c) of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1861(c), and section 11(c) of the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773(c)).

Decision means an initial or final decision of the Judge.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include inquiries regarding procedures, scheduling, and status.

Final administrative decision means an order or decision of NOAA assessing a civil penalty or permit sanction which is not subject to further Agency review under this part, and which is subject to collection proceedings or judicial review in an appropriate Federal district court as authorized by law.

Forfeiture includes, but is not limited to, surrender or relinquishment of any claim to an item by written agreement, or otherwise; or extinguishment of any claim to, and transfer of title to an item to the Government by court order

or by order of the Administrator under a statute.

Initial decision means a decision of the Judge which, under applicable statute and regulation, is subject to review by the Administrator, but which becomes the final administrative decision in the absence of such review.

Judge means Administrative Law Judge.

NOAA (see *Agency*) means either the Administrator or a designee acting on behalf of the Administrator.

Party means the respondent and the Agency as represented by counsel; if they enter an appearance, a joint and several respondent, vessel owner, or permit holder; and any other person allowed to participate under §904.204(a).

Payment agreement means any promissory note, security agreement, settlement agreement, or other contract specifying the terms according to which a permit holder agrees to pay a civil penalty.

Permit means any license, permit, certificate, or other approval issued by NOAA under an applicable statute.

Permit holder means the holder of a permit or any agent or employee of the holder, and includes the owner and operator of a vessel for which the permit was issued.

Sanction means suspension, revocation, or modification of a permit (see §904.320).

Vessel owner means the owner of any vessel that is liable *in rem* for any civil penalty under this part, or whose permit may be subject to sanction as a result of civil penalty proceedings under this part.

Written warning means a notice in writing to a person that a violation of a minor or technical nature has been documented against the person or against the vessel which is owned or operated by the person.

§904.3 Filing and service of documents.

(a) Whenever this part requires service of a document or other paper, such service may effectively be made on the agent for service of process or on the attorney for the person to be served or other representative. Refusal by the person to be served, or his or her agent or attorney, of service of a document

or other paper will be considered effective service of the document or other paper as of the date of such refusal. Service will be considered effective when the document is mailed to an addressee's last known address.

(b) Any documents or pleadings filed or served must be signed:

- (1) By the person or persons filing the same,
- (2) By an officer thereof if a corporation,
- (3) By an officer or authorized employee if a government instrumentality, or
- (4) By an attorney or other person having authority to sign.

(c) A pleading or document will be considered served and/or filed as of the date of the postmark (or as otherwise shown for government-franked mail); or (if not mailed) as of the date actually delivered in person; or as shown by electronic mail transmission.

(d) Time periods begin to run on the day following the date of the document, paper, or event that begins the time period. Saturdays, Sundays, and Federal holidays will be included in computing such time, except that when such time expires on a Saturday, Sunday, or Federal holiday, such period will be extended to include the next business day. This method of computing time periods also applies to any act, such as paying a civil penalty, required by this part to take place within a specified period of time. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays will be excluded in the computation.

(e) If an oral or written application is made to NOAA within 10 days after the expiration of a time period established in this part for the required filing of documents or other papers, NOAA may permit a late filing if NOAA finds reasonable grounds for an inability or failure to file within the time period. All extensions will be in writing. Except as specifically provided in this part, or by order of an Administrative Law Judge (Judge) under this part, no requests for an extension of time may be granted.

Subpart B—Civil Penalties

§ 904.100 General.

This subpart sets forth the procedures governing NOAA administrative proceedings for the assessment of civil penalties under the statutes cited in § 904.1(c).

§ 904.101 Notice of Violation and Assessment (NOVA).

(a) A NOVA will be issued by NOAA and served personally or by registered or certified mail, return receipt requested, upon the person alleged to be subject to a civil penalty (the respondent). A copy of the NOVA will similarly be served upon the permit holder or the vessel owner, if the holder or owner is not the respondent. The NOVA will contain:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provisions of the Act, regulation, license, permit, agreement, or order allegedly violated;

(3) The findings and conclusions upon which NOAA bases the assessment; and

(4) The amount of the civil penalty assessed. The NOVA will also advise of the respondent's rights upon receipt of the NOVA, and will be accompanied by a copy of the regulations in this part governing the proceedings.

(b) In assessing a civil penalty, NOAA will take into account information available to the Agency concerning any factor to be considered under the applicable statute, and any other information that justice or the purposes of the statute require.

(c) The NOVA may also contain a proposal for compromise or settlement of the case. NOAA may also attach documents that illuminate the facts believed to show a violation.

§ 904.102 Procedures upon receipt of a NOVA.

(a) The respondent has 30 days from receipt of the NOVA in which to respond. During this time the respondent may:

(1) Accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA;

(2) Seek to have the NOVA amended, modified, or rescinded under paragraph (b) of this section;

(3) Request a hearing under paragraph (e) of this section;

(4) Request an extension of time to respond under paragraph (c) of this section; or

(5) Take no action, in which case the NOVA becomes final in accordance with § 904.104. The procedures set forth in paragraphs (a) (2), (3), (4), and (5) of this section may also be exercised by the permit holder or vessel owner.

(b) The respondent, the permit holder, or the vessel owner may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them by notifying Agency counsel at the telephone number or address specified in the NOVA. If amendment or modification is sought, Agency counsel will either amend the NOVA or decline to amend it, and so notify the respondent, permit holder, or vessel owner, as appropriate.

(c) The respondent, permit holder, or vessel owner may, within the 30-day period specified in paragraph (a) of this section, request an extension of time to respond. Agency counsel may grant an extension of up to 30 days unless he or she determines that the requester could, exercising reasonable diligence, respond within the 30-day period. If Agency counsel does not respond to the request within 48 hours of its receipt, the request is granted automatically for the extension requested, up to a maximum of 30 days. A telephonic response to the request within the 48-hour period is considered an effective response, and will be followed by written confirmation.

(d) Agency counsel may, for good cause, grant an additional extension beyond the 30-day period specified in paragraph (c) of this section.

(e) If the respondent, the permit holder, or the vessel owner wishes a hearing, the request must be dated and in writing, and must be served either in person or mailed to the address specified in the NOVA. The requester must either attach a copy of the NOVA or refer to the relevant NOAA case number. Agency counsel will promptly forward the request for hearing to the Office of Administrative Law Judges.

(f) Any denial, in whole or in part, of any request under this section that is based upon untimeliness will be in writing.

(g) Agency counsel may, in his or her discretion, treat any communication from a respondent, a permit holder, or vessel owner as a request for a hearing under paragraph (e) of this section.

§ 904.103 Hearing and administrative review.

(a) Any hearing request under § 904.102(e) is governed by the hearing and review procedures set forth in subpart C.

(b) In any hearing held in response to a request under § 904.102(e), the Administrative Law Judge (Judge) will render an initial decision. Any party to the hearing may seek the Administrator's review of the Judge's initial decision, subject to the provisions of subpart C.

§ 904.104 Final administrative decision.

(a) If no request for hearing is timely filed as provided in § 904.102(e), the NOVA becomes effective as the final administrative decision and order of NOAA on the 30th day after service of the NOVA or on the last day of any delay period granted.

(b) If a request for hearing is timely filed in accordance with § 904.102(e), the date of the final administrative decision is as provided in subpart C.

§ 904.105 Payment of final assessment.

(a) Respondent must make full payment of the civil penalty assessed within 30 days of the date upon which the assessment becomes effective as the final administrative decision and order of NOAA under § 904.104 or subpart C. Payment must be made by mailing or delivering to NOAA at the address specified in the NOVA a check or money order made payable in United States currency in the amount of the assessment to the "Treasurer of the United States," or as otherwise directed.

(b) Upon any failure to pay the civil penalty assessed, NOAA may request the Justice Department to recover the amount assessed in any appropriate district court of the United States, or may act under § 904.106.

§ 904.106 Compromise of civil penalty.

(a) NOAA, in its sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty imposed, or which is subject to imposition, except as stated in paragraph (d) of this section.

(b) The compromise authority of NOAA under this section is in addition to any similar authority provided in any applicable statute or regulation, and may be exercised either upon the initiative of NOAA or in response to a request by the alleged violator or other interested person. Any such request should be sent to Agency counsel at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of NOAA under this section nor NOAA's exercise thereof at any time changes the date upon which an assessment is final or payable.

(d) *Exception.* NOAA will not compromise, modify, or remit a civil penalty imposed, or subject to imposition, under the Deep Seabed Hard Mineral Resources Act while an action to review or recover the penalty is pending in a court of the United States.

§ 904.107 Joint and several respondents.

(a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each respondent is liable for the entire penalty, but no more than the amount finally assessed may be collected from the respondents.

(b) A hearing request by one respondent is considered a request by the other respondents. Agency counsel, having received a hearing request from one respondent, will send a copy of it to the other joint and several respondents in the case.

(c) A decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties and on all other joint and several respondents, whether or not they entered an appearance.

§ 904.108 Factors considered in assessing penalties.

(a) Factors to be taken into account in assessing a penalty, depending upon the statute in question, may include the nature, circumstances, extent, and

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gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require. NOAA will take into account a respondent's ability to pay when assessing a civil penalty for a violation of any of the statutes NOAA administers.

(b) NOAA may, in consideration of a respondent's ability to pay, increase or decrease a penalty from an amount that would otherwise be warranted by the other relevant factors. A penalty may be increased if a respondent's ability to pay is such that a higher penalty is necessary to deter future violations, or for commercial violators, to make a penalty more than a cost of doing business. A penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate penalty amount.

(c) Except as provided in paragraph (g) of this section, if a respondent asserts that a penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA. NOAA will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, Agency counsel may require the respondent to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the penalty.

(d) Financial information relevant to a respondent's ability to pay includes, but is not limited to, the value of respondent's cash and liquid assets, ability to borrow, net worth, liabilities, income, prior and anticipated profits, expected cash flow, and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a penalty even if he or she must take such actions as pay in installments over time, borrow money,

liquidate assets, or reorganize his or her business. NOAA's consideration of a respondent's ability to pay does not preclude an assessment of a penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

(e) Financial information regarding respondent's ability to pay should be submitted to Agency counsel as soon after receipt of the NOVA as possible. If a respondent has requested a hearing on the offense alleged in the NOVA and wants his or her inability to pay considered in the initial decision of the Judge, verifiable financial information must be submitted to Agency counsel at least 15 days in advance of the hearing. In deciding whether to submit such information, the respondent should keep in mind that the Judge may assess *de novo* a civil penalty either greater or smaller than that assessed in the NOVA.

(f) Issues regarding ability to pay will not be considered in an administrative review of an initial decision if the financial information was not previously presented by the respondent to the Judge at the hearing.

(g) Whenever a statute requires NOAA to take into consideration a respondent's ability to pay when assessing a penalty, NOAA will take into consideration information available to it concerning a respondent's ability to pay. In such case, the NOVA will advise, in accordance with section 904.102 of this part, that respondent may seek to have the penalty amount modified by Agency counsel on the basis that he or she does not have the ability to pay the penalty assessed. A request to have the penalty amount modified on this basis must be made in accordance with §904.102 of this part and should be accompanied by supporting financial information. Agency counsel may request the respondent to submit such additional verifiable financial information as Agency counsel determines is necessary to evaluate the respondent's financial condition (such as by responding to a financial request form or

written interrogatories, or by authorizing independent verification of respondent's financial condition). A respondent's failure to provide the requested information may serve as the basis, for inferring that such information would not have supported the respondent's assertion of inability to pay the penalty assessed in the NOVA. If the respondent has requested a hearing on the offense alleged in the NOVA, the Agency must submit information on the respondent's financial condition so that the Judge may consider that information, along with any other factors required to be considered, in the Judge's *de novo* assessment of a penalty. Agency counsel may obtain such financial information through discovery procedures under §904.240 of this part, or otherwise. A respondent's refusal or failure to respond to such discovery requests may serve as the basis for inferring that such information would have been adverse to any claim by respondent of inability to pay the assessed penalty, or result in respondent being barred from asserting financial hardship.

[52 FR 10325, Mar. 31, 1987, as amended at 58 FR 58485, Nov. 2, 1993]

Subpart C—Hearing and Appeal Procedures

GENERAL

§904.200 Scope and applicability.

(a) This subpart sets forth the procedures governing the conduct of hearings and the issuance of initial and final decisions of NOAA in administrative proceedings involving alleged violations of the laws cited in §904.1(c) and regulations implementing these laws, including civil penalty assessments and permit sanctions and denials. By separate regulation, these rules may be applied to other proceedings.

(b) Subject to the administrative direction of the Chief Administrative Law Judge, each Administrative Law Judge (Judge) assigned by the Chief Administrative Law Judge is delegated authority to make the initial or final decision of the Agency (whichever is made appropriate by regulation outside this subpart) in proceedings subject to the provisions of this subpart, and to

take actions to promote the efficient and fair conduct of hearings as set out in this subpart. The Judge has no authority to rule on challenges to the validity of regulations promulgated by the Agency.

(c) This subpart is not an independent basis for claiming the right to a hearing, but instead prescribes procedures for the conduct of hearings, the right to which is provided by other authority.

§904.201 Case docketing.

Each request for hearing promptly upon its receipt for filing in the Office of Administrative Law Judges will be assigned a docket number and thereafter the proceeding will be referred to by such number. Written notice of the assignment of hearing to a Judge will promptly be given to the parties.

§904.202 Filing of documents.

(a) Pleadings, papers, and other documents in the proceeding must be filed in conformance with §904.3 directly with the Judge, with copies served on all other parties. Pleadings, papers, and other documents pertaining to administrative review under §904.273 must be filed with the Administrator, with copies served on all other parties.

(b) Unless otherwise ordered by the Judge, discovery requests and answers will be served on the opposing party and need not be filed with the Judge.

§904.203 Appearances.

A party may appear in person or by or with counsel or other representative.

§904.204 Duties and powers of Judge.

The Judge has all powers and responsibilities necessary to preside over the parties and the proceeding, to hold pre-hearing conferences, to conduct the hearing, and to make the decision in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to do the following:

(a) Rule on a request to participate as a party in the proceeding by allowing, denying, or limiting such participation (such ruling will consider views of the parties and be based on whether

the requester could be directly and adversely affected by the decision and whether the requester can be expected to contribute materially to the disposition of the proceedings;

(b) Schedule the time, place, and manner of conducting the pre-hearing conference or hearing, continue the hearing from day to day, adjourn the hearing to a later date or a different place, and reopen the hearing at any time before issuance of the decision, all in the Judge's discretion, having due regard for the convenience and necessity of the parties and witnesses;

(c) Schedule and regulate the course of the hearing and the conduct of the participants and the media, including the power to close the hearings in the interests of justice; seal the record from public scrutiny to protect privileged information, trade secrets, and confidential commercial or financial information; and strike testimony of a witness who refuses to answer a question ruled to be proper;

(d) Administer oaths and affirmations to witnesses;

(e) Rule on discovery requests, establish discovery schedules, and, whenever the ends of justice would thereby be served, take or cause depositions or interrogatories to be taken and issue protective orders under § 904.240(d);

(f) Rule on motions, procedural requests, and similar matters;

(g) Receive, exclude, limit, and otherwise rule on offers of proof and evidence;

(h) Examine and cross-examine witnesses and introduce into the record on the Judge's own initiative documentary or other evidence;

(i) Rule on requests for appearance of witnesses or production of documents and take appropriate action upon failure of a party to effect the appearance or production of a witness or document ruled relevant and necessary to the proceeding; as authorized by law, issue subpoenas for the appearance of witnesses or production of documents;

(j) Require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position;

(k) Take official notice of any matter not appearing in evidence that is

among traditional matters of judicial notice; or of technical or scientific facts within the general or specialized knowledge of the Department of Commerce as an expert body; or of a non-privileged document required by law or regulation to be filed with or published by a duly constituted government body; or of any reasonably available public document; *Provided*, That the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary;

(l) For stated good reason(s), assess a penalty *de novo* without being bound by the amount assessed in the NOVA;

(m) Prepare and submit a decision or other appropriate disposition document and certify the record;

(n) Award attorney fees and expenses as provided by applicable statute or regulation; and

(o) Grant preliminary or interim relief.

§ 904.205 Disqualification of Judge.

(a) The Judge may withdraw voluntarily from a particular case when the Judge deems himself/herself disqualified.

(b) A party may in good faith request the Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the disqualification must file with the Judge a timely affidavit or statement setting forth in detail the facts alleged to constitute the grounds for disqualification, and the Judge will rule on the matter. If the Judge rules against disqualification, the Judge will place all matters relating to such claims of disqualification in the record.

§ 904.206 Pleadings, motions, and service.

(a) The original of all pleadings and documents must be filed with the Office of Administrative Law Judges and a copy served upon each party. All pleadings or documents when submitted for filing must show that service has been made upon all parties. Such service must be made in accordance with § 904.3(a).

(b) Pleadings and documents to be filed may be reproduced by printing or any other process, provided the copies are clear and legible; must be dated,

the original signed in ink or as otherwise verified for electronic mail; and must show the docket description and title of the proceeding, and the title, if any, address, and telephone number of the signatory. If typewritten, the impression may be on only one side of the paper and must be double spaced, pica type, if possible, except that quotations may be single spaced and indented.

(c) Motions must normally be made in writing and must state clearly and concisely the purpose of and relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested.

(d) Unless otherwise provided, the answer to any written motion, pleading, or petition must be served within 20 days after date of service thereof. If a motion states that opposing counsel has no objection, it may be acted upon as soon as practicable, without awaiting the expiration of the 20-day period. Answers must be in writing, unless made in response to an oral motion made at a hearing; must fully and completely advise the parties and the Judge concerning the nature of the opposition; must admit or deny specifically and in detail each material allegation of the pleading answered; and must state clearly and concisely the facts and matters of law relied upon. Any new matter raised in an answer will be deemed controverted.

(e) A response to an answer will be called a reply. A short reply restricted to new matters may be served within 15 days of service of an answer. The Judge has discretion to dispense with the reply. No further responses are permitted.

§ 904.207 Amendment of pleadings or record.

The Judge, upon his or her own initiative or upon application by a party, may order a party to make a more definite statement of any pleading. The Judge has discretion to permit either party to amend its pleadings upon conditions fair to both parties. Harmless errors may be corrected (by deletion or substitution of words or figures), and broad discretion will be exercised by

the Judge in permitting such corrections.

§ 904.208 Extensions of time.

If appropriate and justified, and as provided in § 904.3(e), the Judge may grant any request for an extension of time. Requests for extensions of time must, except in extraordinary circumstances, be made in writing.

§ 904.209 Expedited proceedings.

In the interests of justice and administrative efficiency, the Judge, on his or her own initiative or upon the application of any party, may expedite the proceeding. A motion of a party to expedite the proceeding may, in the discretion of the Judge, be made orally or in writing with concurrent actual notice to all parties. If a motion for an expedited hearing is granted, the hearing on the merits may not be scheduled with less than three days' notice, unless all parties consent to an earlier hearing.

§ 904.210 Summary decision.

The Judge may render a summary decision disposing of all or part of the proceeding if:

(a) Jointly requested by every party to the proceeding; and

(b) There is no genuine issue as to any material fact and a party is entitled to summary decision as a matter of law.

[61 FR 54731, Oct. 22, 1996]

§ 904.211 Failure to appear.

(a) If a party fails to appear after proper service of notice, the hearing may proceed. A notation of failure to appear will be made in the record, and the hearing may be conducted with the parties then present, or may be terminated if the Judge determines that proceeding with the hearing will not aid the decisional process.

(b) The Judge will place in the record all the facts concerning the issuance and service of the notice of time and place of hearing.

(c) The Judge may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.

§ 904.212 Failure to prosecute or defend.

Whenever the record discloses the failure of either party to file documents, respond to orders or notices from the Judge, or otherwise indicates an intention on the part of either party not to participate further in the proceeding, the Judge may issue any order, except dismissal, that is necessary for the just and expeditious resolution of the case.

[51 FR 54731, Oct. 22, 1996]

§ 904.213 Settlements.

If settlement is reached before the Judge has certified the record, the Judge may require the submission of a copy of the settlement agreement to assure that the Judge's consideration of the case is completed and to order the matter dismissed on the basis of the agreement.

§ 904.214 Stipulations.

The parties may, by stipulation, agree upon any matters involved in the proceeding and include such stipulations in the record with the consent of the Judge. Written stipulations must be signed and served upon all parties.

§ 904.215 Consolidation.

The Judge may order two or more proceedings that involve substantially the same parties or the same issues consolidated and/or heard together.

§ 904.216 Prehearing conferences.

(a) Prior to any hearing or at other time deemed appropriate, the Judge may, upon his or her own initiative, or upon the application of any party, arrange a telephone conference and, where appropriate, record such telephone conference, or direct the parties to appear for a conference to consider:

- (1) Simplification or clarification of the issues or settlement of the case by consent;
- (2) The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (3) Agreements and rulings to facilitate the discovery process;

(4) Limitation of the number of expert witnesses or other avoidance of cumulative evidence;

(5) The procedure, course, and conduct of the hearing;

(6) The distribution to the parties and the Judge prior to the hearing of written testimony and exhibits in order to expedite the hearing;

(7) Such other matters as may aid in the disposition of the proceeding.

(b) The Judge in his or her discretion may issue an order showing the matters disposed of in such conference.

DISCOVERY

§ 904.240 Discovery generally.

(a) *Preliminary position on issues and procedures.* Prior to hearing the Judge will ordinarily require from the parties a written submission stating their preliminary positions on legal and factual issues and procedures, listing potential witnesses and summarizing their testimony, and listing exhibits. Except for information regarding a respondent's ability to pay an assessed penalty, this document, which must be served on all other parties, will normally obviate the need for further discovery. Failure to provide the requested information may result in the exclusion of witnesses and/or exhibits at the hearing. See also § 904.212. A party has the affirmative obligation to supplement the submission as new information becomes known to the party.

(b) *Additional discovery.* Upon written motion by a party, the Judge may allow additional discovery only upon a showing of relevance, need, and reasonable scope of the evidence sought, by one or more of the following methods: deposition upon oral examination or written questions, written interrogatories, production of documents or things for inspection and other purposes, and requests for admission. With respect to information regarding a respondent's ability to pay an assessed penalty, the Agency may serve any discovery request (i.e., deposition, interrogatories, admissions, production of documents) directly upon the respondent without first seeking an order from the Judge.

(c) *Time limits.* Motions for depositions, interrogatories, admissions, or

production of documents or things may not be filed within 20 days of hearing except on order of the Judge for good cause shown. Oppositions to a discovery motion must be filed within 10 days of service unless otherwise provided in these rules or by the Judge.

(d) *Oppositions.* Oppositions to any discovery motion or portion thereof must state with particularity the grounds relied upon. Failure to object in a timely fashion constitutes waiver of the objection.

(e) *Scope of discovery.* The Judge may limit the scope, subject matter, method, time, or place of discovery. Unless otherwise limited by order of the Judge, the scope of discovery is as follows:

(1) *In general.* As allowed under paragraph (b) of this section, parties may obtain discovery of any matter, not privileged, that is relevant to the allegations of the charging document, to the proposed relief, or to the defenses of any respondent, or that appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Hearing preparation: Materials.* A party may not obtain discovery of materials prepared in anticipation of litigation except upon a showing that the party seeking discovery has a substantial need for the materials in preparation of his or her case, and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party are not discoverable under this section.

(3) *Hearing preparation: Experts.* A party may discover the substance of the facts and opinions to which an expert witness is expected to testify and a summary of the grounds for each opinion. A party may also discover facts known or opinions held by an expert consulted by another party in anticipation of litigation but not expected to be called as a witness upon a showing of exceptional circumstances making it impracticable for the party seeking discovery to obtain such facts or opinions by other means.

(f) *Failure to comply.* If a party fails to comply with any subpoena or order

concerning discovery, the Judge may, in the interest of justice:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that the matter or matters covered by the order or subpoena are established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon, in support of any claim or defense, testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Strike part or all of a pleading (except a request for hearing), a motion or other submission by the party, concerning the matter or matters covered by the order or subpoena.

[52 FR 10325, Mar. 31, 1987, as amended at 58 FR 58486, Nov. 2, 1993; 61 FR 54731, Oct. 22, 1996]

§ 904.241 Depositions.

(a) *Notice.* If a motion for deposition is granted, and unless otherwise ordered by the Judge, the party taking the deposition of any person must serve on that person, and each other party, written notice at least 15 days before the deposition would be taken (or 25 days if the deposition is to be taken outside the United States). The notice must state the name and address of each person to be examined, the time and place where the examination would be held, the name and mailing address of the person before whom the deposition would be taken, and the subject matter about which each person would be examined.

(b) *Taking the deposition.* Depositions may be taken before any officer authorized to administer oaths by the law of the United States or of the place where the examination is to be held, or before a person appointed by the Judge. Each deponent will be sworn, and any party has the right to cross-examine. Objections are not waived by failure to make them during the deposition unless the ground of the objection is one

that might have been removed if presented at that time. The deposition will be recorded, transcribed, signed by the deponent, unless waived, and certified by the officer before whom the deposition was taken. All transcription costs associated with the testimony of a deponent will be borne by the party seeking the deposition. Each party will bear its own expense for any copies of the transcript. See also § 904.252(c).

(c) *Alternative deposition methods.* By order of the Judge, the parties may use other methods of depositing parties or witnesses, such as telephonic depositions or depositions upon written questions. Objections to the form of written questions are waived unless made within five days of service of the questions.

(d) *Use of depositions at hearing.* (1) At hearing any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then testifying, may be used against any party who was present or represented at the taking of the deposition, or had reasonable notice.

(2) The deposition of a witness may be used by any party for any purpose if the Judge finds:

(i) That the witness is unable to attend due to death, age, health, imprisonment, disappearance or distance from the hearing site; or

(ii) That exceptional circumstances make it desirable, in the interest of justice, to allow the deposition to be used.

(3) If only part of a deposition is offered in evidence by a party, any party may introduce any other part.

§ 904.243 Interrogatories to parties.

(a) *Use at hearing.* If ordered by the Judge, any party may serve upon any other party written interrogatories. Answers may be used at hearing in the same manner as depositions under § 904.241(d).

(b) *Answers and objections.* Answers and objections must be made in writing under oath, and reasons for the objections must be stated. Answers must be signed by the person making them and objections by the attorney making them. Unless otherwise ordered, answers and objections must be served on all parties within 20 days after service of the interrogatories.

(c) *Option to produce records.* Where the answer to an interrogatory may be ascertained from the records of the party upon whom the interrogatory is served, it is sufficient to specify such records and afford the party serving the interrogatories an opportunity to examine them.

§ 904.243 Admissions.

(a) *Request.* If ordered by the Judge, any party may serve on any other party a written request for admission of the truth of any relevant matter of fact set forth in the request, including the genuineness of any relevant document described in the request. Copies of documents must be served with the request. Each matter of which an admission is requested must be separately stated.

(b) *Response.* Each matter is admitted unless a written answer or objection is served within 20 days of service of the request, or within such other time as the Judge may allow. The answering party must specifically admit or deny each matter, or state the reasons why he or she cannot truthfully admit or deny it.

(c) *Effect of admission.* Any matter admitted is conclusively established unless the Judge on motion permits withdrawal or amendment of it for good cause shown.

§ 904.244 Production of documents and inspection.

(a) *Scope.* If ordered by the Judge, any party may serve on any other party a request to produce a copy of any document or specifically designated category of documents, or to inspect, copy, photograph, or test any such document or tangible thing in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request must set forth:

(1) The items to be produced or inspected by item or by category, described with reasonable particularity, and

(2) A reasonable time, place, and manner for inspection. The party upon whom the request is served must serve within 20 days a response or objections,

which must address each item or category and include copies of the requested documents.

§ 904.245 Subpoenas.

(a) *In general.* Subpoenas for the attendance and testimony of witnesses and the production of documentary evidence for the purpose of discovery or hearing may be issued as authorized by the statute under which the proceeding is conducted.

(b) *Timing.* Applications for subpoenas must be submitted at least 10 days before the scheduled hearing or deposition.

(c) *Motions to quash.* Any person to whom a subpoena is directed or any party may move to quash or limit the subpoena within 10 days of its service or on or before the time specified for compliance, whichever is shorter. The Judge may quash or modify the subpoena.

(d) *Enforcement.* In case of disobedience to a subpoena, NOAA may request the Justice Department to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

HEARINGS

§ 904.250 Notice of time and place of hearing.

(a) The Judge will promptly serve on the parties notice of the time and place of hearing. The hearing will not, except in extraordinary circumstances, be held less than 20 days after service of the notice of hearing.

(b) In setting a place for hearing, the Judge will consider the convenience and costs of the parties, including but not limited to transportation costs and living expenses of witnesses, attorneys, and the Judge; place of residence of the respondent(s); scheduling of other hearings within the same region; and availability of facilities and court reporters.

(c) Upon the consent of each party to the proceeding, the Judge may order that all or part of a proceeding be heard on submissions or affidavits if it appears that substantially all important issues may be resolved by means of written materials and that efficient disposition of the proceeding can be

made without an in-person hearing. For good cause, the Judge may, in his sole discretion, order that the testimony of witnesses be taken by telephone.

[52 FR 10325, Mar. 31, 1987, as amended at 61 FR 54731, Oct. 22, 1996]

§ 904.251 Evidence.

(a) At the hearing, every party has the right to present oral or documentary evidence in support of its case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. This paragraph may not be interpreted to diminish the powers and duties of the Judge under this subpart.

(b) All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the proceedings, and hearsay evidence is not inadmissible as such.

(c) Formal exceptions to the rulings of the Judge are unnecessary. It is sufficient that a party, at the time of the ruling, makes known the action that it desires the Judge to take or its objection to an action taken, and the grounds therefor. Rulings on each objection must appear in the record.

(d) In any case involving a charged violation of law in which the party charged has admitted an allegation, evidence may be taken to establish matters of aggravation or mitigation.

(e) Exhibits in a foreign language must be translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits, along with the name of the translator, must be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

(f) A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. The Judge, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party.

§904.252 Witnesses.

(a) Any witness not a party may have personal counsel to advise him or her as to his or her rights, but such counsel may not otherwise participate in the hearing.

(b) Witnesses who are not parties may be excluded from the hearing room prior to the taking of their testimony.

(c) Witnesses other than NOAA employees subpoenaed under these rules, including §904.245, will be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken are entitled to the same fees as are paid for like services in the courts of the United States. Fees and any other related expenses for NOAA employees as authorized by the NOAA travel handbook will be paid by the party at whose instance the witness appears or the deposition is taken.

(d) If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent to which interpreters are to be used. When available, the interpreter must be court certified under 28 U.S.C. 1827.

§904.253 Interlocutory appeals.

(a) At the request of a party or on the Judge's own initiative, the Judge may certify to the Administrator for review a ruling that does not finally dispose of the proceeding, if the Judge determines that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(b) Upon certification by the Judge of the interlocutory ruling for review, the parties have 10 days to serve any briefs associated with the certification. The Administrator will promptly decide the matter.

(c) No interlocutory appeal lies as to any ruling not certified by the Judge.

§904.254 Ex parte communications.

(a) Except to the extent required for disposition of ex parte matters as authorized by law, after issuance of a NOVA, NOPS, or NIDP and until the final decision of the Agency is effective

under these regulations, no ex parte communication relevant to the merits of the proceeding may be made, or knowingly caused to be made:

(1) By the Judge or by an Agency employee involved in the decisional process of the proceeding to any interested person outside the Department of Commerce or to any Agency employee involved in the investigation or prosecution of the case;

(2) By any Agency employee involved in the investigation or prosecution of the case to the Judge or to any Agency employee involved in the decisional process of the proceeding; or

(3) By an interested person outside the Department of Commerce to the Judge or to any Agency employee involved in the decisional process of the proceeding.

(b) An Agency employee or Judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the Judge or Administrator, as appropriate, may take action consistent with these rules, the applicable statute, and 5 U.S.C. 556(d) and 557(d).

(c) Agency counsel may not participate or advise in the decision of the Judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with this subpart. In addition, the Judge may not consult any person or party on a fact in issue unless notice and opportunity for all parties to participate is provided.

(d)(1) Paragraphs (a) and (b) of this section do not apply to communications concerning national defense or foreign policy matters. Such ex parte communications to or from an Agency employee on national defense or foreign policy matters, or from employees of the United States Government involving intergovernmental negotiations, are allowed if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

(2) Ex parte communications subject to this paragraph will be made a part of the record to the extent that they do not include information classified under an Executive Order. Classified

information will be included in a classified portion of the record that will be available for review only in accordance with applicable law.

POST-HEARING

§904.260 Official transcript.

(a) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, will be filed with the Office of Administrative Law Judges. Transcripts of testimony will be available in any proceeding and will be supplied to the parties upon the payment of fees at the rate provided in the agreement with the reporter.

(b) The Judge may determine whether "ordinary copy," "daily copy," or other copy (as those terms are defined by contract) will be necessary and required for the proper conduct of the proceeding.

§904.261 Post-hearing briefs.

(a) Unless a different schedule is established in the discretion of the Judge, including the procedure in paragraph (b) of this section, the parties may file proposed findings of fact and conclusions of law, together with supporting briefs, within 30 calendar days from service of the hearing transcript. Reply briefs may be submitted within 15 days after service of the proposed findings and conclusions to which they respond, unless the Judge sets a different schedule.

(b) In cases involving few parties, limited issues, and short hearings, the Judge may require that any proposed findings and conclusions and reasons in support be presented orally at the close of the hearing. In such case, the Judge will advise the parties in advance of hearing.

§904.262 Documents, copies and exhibits.

(a) If original documents have been received in evidence, a true copy thereof, or of such part as may be material or relevant, may be substituted in lieu of the original during the hearing or at its conclusion. The Judge may, in his or her discretion, and after notice to the other parties, allow the withdrawal of original exhibits or any part thereof

by the party entitled thereto for the purpose of substituting copies. The substitution of true copies of exhibits, or any part thereof, may be required by the Judge in his or her discretion as a condition of granting permission for withdrawal of the original.

(b) Photographs may be substituted for physical evidence in the discretion of the Judge.

(c) Except upon the Judge's order, or upon request by a party, physical evidence will be retained after the hearing by the authorized enforcement officer responsible for the case.

DECISION

§904.270 Record of decision.

(a) The exclusive record of decision consists of the official transcript of testimony and proceedings; exhibits admitted into evidence; briefs, pleadings, and other documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding. Any other exhibits and records of any ex parte communications will accompany the record of decision.

(b) The Judge will arrange for appropriate storage of the records of any proceeding, which place of storage need not necessarily be located physically within the Office of Administrative Law Judges.

(c) Exhibits offered after the close of a hearing will not be admitted, unless the Judge specifically keeps open or reopens the record to admit them.

§904.271 Decision.

(a) After expiration of the period provided in §904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and the ruling on any proposed findings or conclusions presented by the parties;

(2) A statement of any facts noticed or relied upon in the decision; and

(3) Such other matters as the Judge considers appropriate.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. The Judge may in such case direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties by registered or certified mail, return receipt requested, and will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) Unless the Judge orders a stay under § 904.272, or unless a petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative, an initial decision becomes effective as the final administrative decision of NOAA 30 days after service, unless otherwise provided by statute or regulations.

§ 904.272 Petition for reconsideration.

Unless an order of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided and the alleged errors or relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or decision. Neither the filing nor the granting of a petition for reconsideration may operate as a stay of an order or decision or its effectiveness date (including for purposes of § 904.273) unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the proceeding may file an answer in support or in opposition. In the Judge's discretion, the hearing may be reopened to consider matters raised in a petition that could not reasonably have been foreseen prior to issuance of the order or decision.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition

for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW., Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review must be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review may be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent;

(3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(4) A prejudicial procedural error has occurred.

(d) Each issue must be separately numbered, concisely stated, and supported by detailed citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) No oral argument on petitions for discretionary review will be allowed.

(f) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies are allowed.

(g) If the Administrator declines to exercise discretionary review, such

order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final decision of NOAA. The Administrator need not give reasons for declining review.

(h) If the Administrator grants a petition for discretionary review, he or she will issue an order specifying issues to be briefed and a briefing schedule. Such issues may constitute one or more of the issues raised in the petition for discretionary review and/or matters the Administrator wishes to review on his or her own initiative. Only those issues specified in the order may be argued in the briefs and considered by the Administrator. No oral argument will be permitted.

(i) After expiration of the period for filing briefs under paragraph (h) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision.

Subpart D—Permit Sanctions and Denials

GENERAL

§ 904.300 Scope and applicability.

(a) This subpart sets forth policies and procedures governing the suspension, revocation, modification, and denial of permits for reasons relating to enforcement of the statutes cited in § 904.1(c), except for the statutes listed in paragraph (b) of this section. These reasons include nonpayment of civil penalties or criminal fines, and violations of statutes, regulations, or permit conditions. Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement. As appropriate, and unless otherwise specified in this subpart, the provisions of Subparts A, B, and C apply to this subpart.

(b) Regulations governing sanctions and denials of permits issued under the

Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401 *et seq.*) appear at 15 CFR part 970; under the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 *et seq.*), at 15 CFR part 981.

§ 904.301 Bases for sanctions or denials.

(a) Unless otherwise specified in a settlement agreement, or otherwise provided in this subpart, NOAA may take action under this subpart with respect to any permit issued under the statutes cited in § 904.1(c). The bases for an action to sanction or deny a permit are as follows:

(1) The commission of any offense prohibited by any statute administered by NOAA, including violation of any regulation promulgated or permit condition or restriction prescribed thereunder, by the permit holder or with the use of a permitted vessel;

(2) The failure to pay a civil penalty assessed under subparts B and C of this part; or

(3) The failure to pay a criminal fine imposed or to satisfy any other liability incurred in a judicial proceeding under any of the statutes administered by NOAA.

(b) A sanction may be imposed or a permit denied under this subpart with respect to the particular permit pertaining to the offense or nonpayment, and may also be applied to any NOAA permit held or sought by the permit holder, including permits for other activities or for other vessels. Examples of the application of this policy are the following:

(1) NOAA suspends Vessel A's fishing permit for nonpayment of a civil penalty pertaining to Vessel A. The owner of Vessel A buys Vessel B and applies for a permit for Vessel B to participate in the same or a different fishery. NOAA may withhold that permit until the sanction against vessel A is lifted.

(2) NOAA revokes a Marine Mammal Protection Act permit for violation of its conditions. The permit holder subsequently applies for a permit under the Endangered Species Act. NOAA may deny the ESA application.

(3) Captain X, an officer in Country Y's fishing fleet, is found guilty of assaulting an enforcement officer. NOAA may impose a condition on the permits

of Country Y's vessels that they may not fish in the fishery conservation zone with Captain X aboard. (See §904.320(c).)

(c) Sanction not extinguished by sale. [Reserved]

§904.302 Notice of permit sanction (NOPS).

(a) A NOPS will be served personally or by registered or certified mail, return receipt requested, on the permit holder. When a foreign fishing vessel is involved, service will be made on the agent authorized to receive and respond to any legal process for vessels of that country.

(b) The NOPS will set forth the sanction to be imposed, the bases for the sanction, and any opportunity for a hearing. It will state the effective date of the sanction, which will ordinarily not be earlier than 30 calendar days after the date of receipt of the NOPS (see §904.322).

(c) Upon demand by an authorized enforcement officer, a permit holder must surrender a permit against which a sanction has taken effect. The effectiveness of the sanction, however, does not depend on surrender of the permit.

§904.303 Notice of intent to deny permit (NIDP).

(a) NOAA may issue an NIDP if the applicant has been charged with a violation of a statute, regulation, or permit administered by NOAA.

(b) The NIDP will set forth the basis for its issuance and any opportunity for a hearing, and will be served in accordance with §904.302(a).

(c) NOAA will not refund any fee(s) submitted with a permit application if an NIDP is issued.

(d) An NIDP may be issued in conjunction with or independent of a NOPS. Nothing in this section should be interpreted to preclude NOAA from initiating a permit sanction action following issuance of the permit, or from withholding a permit under §904.310(c) or §904.320.

§904.304 Opportunity for hearing.

(a) Except as provided in paragraph (b) of this section, the recipient of a NOPS or NIDP will be provided an opportunity for a hearing. The hearing

may be combined with any other hearing under this part.

(b) There will be no opportunity for a hearing if, with respect to the violation that forms the basis for the NOPS or NIDP, the permit holder had a previous opportunity to participate as a party in a judicial or administrative hearing, whether or not the permit holder did participate, and whether or not such a hearing was held.

(c) If entitled to a hearing under this section, the recipient of a NOPS or NIDP will have 30 calendar days from receipt of the notice to request a hearing. A request for hearing must be dated and in writing. Failure to request a hearing within 30 days constitutes a waiver of the opportunity for a hearing.

(d) Even if no hearing is requested, NOAA may order a hearing if it will serve the interests of justice. This paragraph does not create any right to a hearing in addition to the right provided in paragraph (a) of this section.

SANCTIONS FOR NONPAYMENT OF PENALTIES

§904.310 Nature of sanctions.

(a) NOAA may suspend a permit if:

(1) A civil penalty has been assessed against the permit holder under subparts B and C of this part, but the permit holder has failed to pay the penalty, or has defaulted on a payment agreement; or

(2) A criminal fine or other liability for violation of any of the statutes administered by NOAA has been imposed against the permit holder in a judicial proceeding, but payment has not been made.

(b) NOAA will suspend any permit issued to a foreign fishing vessel under section 204(b) of the Magnuson Fishery Conservation and Management Act under the circumstances set forth in paragraph (a) of this section.

(c) NOAA will withhold any other permit for which the permit holder applies if either condition in §904.310(a) is applicable.

§904.311 Compliance.

If the permit holder pays the fine or penalty in full or agrees to terms satisfactory to NOAA for payment:

(a) The suspension will not take effect;

(b) Any permit suspended under §904.310 will be reinstated by affirmative order of NOAA; or

(c) Any application by the permit holder may be granted if the permit holder is otherwise qualified to receive the permit.

SANCTIONS FOR VIOLATIONS

§904.320 Nature of sanctions.

Subject to the requirements of this subpart, NOAA may take any of the following actions or combination of actions if a permit holder or permitted vessel violates a statute administered by NOAA, or any regulation promulgated or permit condition prescribed thereunder:

(a) *Revocation.* A permit may be cancelled, with or without prejudice to issuance of the permit in the future. Additional requirements for issuance of any future permit may be imposed.

(b) *Suspension.* A permit may be suspended either for a specified period of time or until stated requirements are met, or both. If contingent on stated requirements being met, the suspension is with prejudice to issuance of any permit until the requirements are met.

(c) *Modification.* A permit may be modified, as by imposing additional conditions and restrictions. If the permit was issued for a foreign fishing vessel under section 204(b) of the Magnuson Fishery Conservation and Management Act, additional conditions and restrictions may be imposed on the application of the foreign nation involved and on any permits issued under such application.

§904.321 Reinstatement of permit.

(a) A permit suspended for a specified period of time will be reinstated automatically at the end of the period.

(b) A permit suspended until stated requirements are met will be reinstated only by affirmative order of NOAA.

§904.322 Interim action.

(a) To protect marine resources during the pendency of an action under this subpart, in cases of willfulness, or

as otherwise required in the interest of public health, welfare, or safety, an Administrative Law Judge may order immediate suspension, modification, or withholding of a permit until a decision is made on the action proposed in a NOPS or NIDP.

(b) The Judge will order interim action under paragraph (a) of this section, only after finding that there exists probable cause to believe that the violation charged in the NOPS or NIDP was committed. The Judge's finding of probable cause, which will be summarized in the order, may be made:

(1) After review of the factual basis of the alleged violation, following an opportunity for the parties to submit their views (orally or in writing, in the Judge's discretion); or

(2) By adoption of an equivalent finding of probable cause or an admission in any administrative or judicial proceeding to which the recipient of the NOPS or NIDP was a party, including, but not limited to, a hearing to arrest or set bond for a vessel in a civil forfeiture action or an arraignment or other hearing in a criminal action. Adoption of a finding or admission under this paragraph may be made only after the Judge reviews pertinent portions of the transcript or other records, documents, or pleadings from the other proceeding.

(c) An order for interim action under paragraph (a) of this section is unappealable and will remain in effect until a decision is made on the NOPS or NIDP. Where such interim action has been taken, the Judge will expedite any hearing requested under §904.304.

Subpart E—Written Warnings

§904.400 Purpose and scope.

This subpart sets forth the policy and procedures governing the issuance and use of written warnings by persons authorized to enforce the statutes administered by NOAA, and the review of such warnings. A written warning may be issued in lieu of assessing a civil penalty or initiating criminal prosecution for violation of any of the laws cited in §904.1(c).

§ 904.401 Written warning as a prior offense.

A written warning may be used as a basis for dealing more severely with a subsequent offense, including, but not limited to, a violation of the same statute or an offense involving an activity that is related to the prior offense.

§ 904.402 Procedures.

(a) Any person authorized to enforce the laws listed in § 904.1(c) who finds a violation of one of the laws may issue a written warning to a violator in lieu of other law enforcement action that could be taken under the applicable statute.

(b) The written warning will:

(1) State that it is a "written warning";

(2) State the factual and statutory or regulatory basis for its issuance;

(3) Advise the violator of its effect in the event of a future violation; and

(4) Inform the violator of the right of review and appeal under § 904.403.

(c) NOAA will maintain a record of written warnings that are issued.

(d) If, within 120 days of the date of the written warning, further investigation indicates that the violation is more serious than realized at the time the written warning was issued, or that the violator previously committed a similar offense for which a written warning was issued or other enforcement action was taken, NOAA may withdraw the warning and commence other civil or criminal proceedings.

(e) For written warnings under the Magnuson Fishery Conservation and Management Act or the Northern Pacific Halibut Act of 1982, the enforcement officer will note the warning, its date, and reason for its issuance on the permit, if any, of the vessel used in the violation. If noting the warning on the permit of the vessel is impracticable, notice of the written warning will be served personally, or by registered or certified mail, return receipt requested, on the vessel's owner, operator, or designated agent for service of process, and such service will be deemed notation on the permit.

§ 904.403 Review and appeal of a written warning.

(a) If a person receives a written warning from an enforcement agent, the person may, within 90 days of receipt of the written warning, seek review by the appropriate NOAA Regional Attorney. The request must be in writing and must present the facts and circumstances that explain or deny the violation described in the warning. The Regional Attorney will review the information and notify the person of his or her decision.

(b) If a person receives a written warning from a Regional Attorney or staff attorney, or receives a decision from a Regional Attorney affirming a written warning, the person may appeal the warning or decision to the NOAA Assistant General Counsel for Enforcement and Litigation. The appeal must be brought within 30 days of receipt of the warning or decision from the Regional Attorney. The Assistant General Counsel for Enforcement and Litigation may, in his or her discretion, affirm, expunge, or modify the written warning and will notify the person of the decision. The decision constitutes the final agency action.

(c) The addresses of the NOAA Regional Attorneys are:

Regional Counsel, Office of General Counsel,
NOAA, 14 Elm Street, Federal Building,
Gloucester, MA 01930

Regional Counsel, Office of General Counsel,
NOAA, 9450 Koger Blvd., Suite 102, St. Petersburg, FL 33702

Regional Counsel, Office of General Counsel,
NOAA, Bldg C15700, 7600 Sandpoint Way,
NE, Seattle, WA 98115

Regional Counsel, Office of General Counsel,
NOAA, 300 South Ferry Street, Room 2013,
Terminal Island, CA 90731

Regional Counsel, Office of General Counsel,
NOAA, P.O. Box 1668, Juneau, AK 99802

The address of the Assistant General Counsel for Enforcement and Litigation is 1825 Connecticut Avenue NW, Suite 607, Washington, DC 20235.

Subpart F—Seizure and Forfeiture Procedures**§ 904.500 Purpose and scope.**

(a) This subpart sets forth procedures governing the release or forfeiture of seized property (except property seized

and held solely as evidence) that is subject to forfeiture under the various statutes administered by NOAA.

(b) Except as provided in this subpart, these regulations apply to all seized property subject to forfeiture under the statutes listed in Subpart A. This subpart is in addition to, and not in contradiction of, any special rules regarding seizure, holding or disposition of property seized under these statutes.

§ 904.501 Notice of seizure.

Except where the owner, consignee, or other party that the facts of record indicate has an interest in the seized property is personally notified, or where seizure is made under a search warrant, NOAA will, as soon as practicable following the seizure or other receipt of seized property, mail notice of the seizure by registered or certified mail, return receipt requested, to the owner or consignee, if known or easily ascertainable, or other party that the facts of record indicate has an interest in the seized property. The notice will describe the seized property and state the time, place and reason for the seizure. The notice will inform each interested party of his or her right to apply for remission or mitigation of the forfeiture (including any agreement that may be required under § 904.506(b)(2)(vii)). The notice may be combined with a notice of the sale of perishable fish issued under § 904.505.

§ 904.502 Bonded release.

NOAA may, in its sole discretion, release any seized property upon deposit with NOAA of the full value of the property or such lesser amount as NOAA deems sufficient to protect the interests served by the applicable statute. The deposit will be held in a NOAA suspense account, or deposited with the appropriate court, pending the outcome of forfeiture proceedings. In addition, NOAA may, in its sole discretion, accept a bond or other security in place of fish, wildlife, or other property seized. The bond will contain such conditions as NOAA deems appropriate. The provisions of § 904.506(f) apply to NOAA's determination whether to release the property. The deposit or bond will for all purposes be considered to

represent the property seized and subject to forfeiture.

§ 904.503 Appraisal.

NOAA will appraise seized property to determine its domestic value. Domestic value means the price at which such or similar property is offered for sale at the time and place of appraisal in the ordinary course of trade. If there is no market for the seized property at the place of appraisal, the value in the principal market nearest the place of appraisal will be used. If the seized property may not lawfully be sold in the United States, its domestic value will be determined by other reasonable means.

§ 904.504 Administrative forfeiture proceedings.

(a) *When authorized.* This section applies to property that is determined under § 904.503 to have a value of \$100,000 or less, and that is subject to administrative forfeiture under the applicable statute. This section does not apply to conveyances seized in connection with criminal proceedings.

(b) *Procedure.* (1) NOAA will publish a notice of proposed forfeiture once a week for at least three successive weeks in a newspaper of general circulation in the Federal judicial district in which the property was seized. However, if the value of the seized property does not exceed \$1,000, the notice may be published by posting for at least three successive weeks in a conspicuous place accessible to the public at the National Marine Fisheries Service Enforcement Office, United States District Court, or the United States Customs House nearest the place of seizure, with the date of posting indicated on the notice. In addition, a reasonable effort will be made to serve the notice personally, or by registered or certified mail, return receipt requested, on each person whose whereabouts and interest in the property are known or easily ascertainable.

(2) The notice of proposed forfeiture will:

(i) Describe the seized property, including any applicable registration or serial numbers;

(ii) State the time, place and reason for the seizure; and

(iii) Describe the rights of an interested person to file a claim to the property (including the right to file a motion to stay administrative forfeiture proceedings and to petition to remit or mitigate the forfeiture).

(3)(i) Except as provided in paragraph (b)(4) of this section, any person claiming the seized property may file a claim with NOAA, at the address indicated in the notice, within 20 days of the date the notice was first published or posted. The claim must state the claimant's interest in the property.

(ii) Except as provided in paragraph (b)(3)(v) or (b)(4) of this section, a bond for costs in the penal sum of \$5,000 or 10 per cent of the appraised value of the property, whichever is lower, but not less than \$250, with sureties satisfactory to the Administrator, must be filed with the claim for seized property. The bond may be posted on Customs form 4615 or a similar form provided by NOAA. There must be endorsed on the bond a list or schedule in substantially the following form, signed by the claimant in the presence of witnesses, and attested by the witnesses:

List or schedule containing a particular description of seized article, claim for which is covered by the within bond; to wit:

The foregoing list is correct.

Claimant

Attest:

A certified check may be substituted for a bond.

(iii) Filing a claim and posting a bond does not entitle the claimant to possession of the property. However, it does stop administrative forfeiture proceedings.

(iv) If the claim and bond are filed timely in accordance with this section, NOAA will refer the matter to the Attorney General to institute forfeiture proceedings in the appropriate United States District Court.

(v) Upon satisfactory proof of financial inability to post the bond, NOAA

may waive the bond requirement for any person claiming an interest in the seized property.

(4) Instead of, or in addition to, filing a claim and bond under paragraph (b)(3) of this section, any person claiming the seized property may file with NOAA within 20 days after the date of first publication or posting of the notice of proposed forfeiture, a motion to stay administrative forfeiture proceedings. The motion must contain:

(i) The claimant's verified statement showing the claimant's absolute title to the seized property, free of all liens or other third party interests; and

(ii) The claimant's offer to pay in advance all reasonable costs anticipated for storage and maintenance of the property. NOAA, in its discretion, may grant the stay and impose any conditions deemed reasonable, including but not limited to length of the stay, factors that would automatically terminate the stay, and any requirement for a bond to secure payment of storage or maintenance costs. If NOAA denies or terminates the stay, the claimant, if he or she has not already done so, has 20 days from receipt of the denial or termination order to file a claim and bond in accordance with paragraph (b)(3) of this section. Failure to file the claim and bond within that 20 days will result in summary forfeiture under paragraph (b)(5) of this section.

(5) If a claim and bond are not filed within 20 days of notice in accordance with this section, or if a motion for a stay under paragraph (b)(4) is pending, NOAA will declare the property forfeited. The declaration of forfeiture will be in writing and will be served on each person whose whereabouts and prior interest in the seized property are known or easily ascertainable. The forfeited property will be subject to disposition as authorized by law and regulations of NOAA.

(6) If the appraised value of the property is more than \$100,000, or a timely and satisfactory claim and bond for property appraised at \$100,000 or less are submitted to NOAA, the matter will be referred to the Attorney General to institute *in rem* proceedings in the appropriate United States District Court.

§904.505 Summary sale.

(a) In view of the perishable nature of fish, any person authorized to enforce a statute administered by NOAA may, as authorized by law, sell or cause to be sold, and any person may purchase, for not less than its domestic fair market value, fish seized under such statute.

(b) Any person purchasing fish subject to this section must deliver the proceeds of the sale to a person authorized to enforce a statute administered by NOAA immediately upon request of such authorized person. Anyone who does not so deliver the proceeds may be subject to penalties under the applicable statute or statutes.

(c) NOAA will give notice of the sale by registered or certified mail, return receipt requested, to the owner or consignee, if known or easily ascertainable, or to any other party that the facts of record indicate has an interest in the seized fish, unless the owner or consignee or other interested party has otherwise been personally notified. Notice will be sent either prior to the sale, or as soon thereafter as practicable.

(d) The proceeds of the sale, after deducting any reasonable costs of the sale, will be subject to any administrative or judicial proceedings in the safe manner as the seized fish would have been, including an action *in rem* for the forfeiture of the proceeds. Pending disposition of such proceedings, the proceeds will, as appropriate, either be deposited in a NOAA suspense account or submitted to the appropriate court. The proceeds will not be subject to release under §904.502 or §904.506(f).

(e) Seizure and sale of fish is without prejudice to any other remedy or sanction authorized by law.

§904.506 Remission and mitigation of forfeiture.

(a) *Application of this section.* (1) This section establishes procedures for filing with NOAA a petition for relief from forfeitures incurred, or alleged to have been incurred, under any statute administered by NOAA that authorizes the remission or mitigation of forfeitures.

(2) Although NOAA may properly consider a petition for relief from forfeiture along with other consequences

of a violation, the remission or mitigation of a forfeiture is not dispositive of any criminal charge filed, civil penalty assessed, or permit sanction proposed, unless NOAA expressly so states. Remission or mitigation of a forfeiture is in the nature of executive clemency and is granted in the sole discretion of NOAA only when consistent with the purposes of the particular statute involved and this section.

(3) NOAA will not consider a petition for remission or mitigation while a forfeiture proceeding is pending in federal court. Once such a case is referred to the Attorney General for institution of judicial proceedings, and until the proceedings are completed, any petition received by NOAA will be forwarded to the Attorney General for consideration.

(b) *Petition for relief from forfeiture.* (1) Any person having an interest in property seized and subject to forfeiture may file a petition for relief from forfeiture. Unless otherwise directed in a notice concerning the seized property, the petition shall be addressed to NOAA and filed with the Regional Attorney nearest to the place where the property is held (addresses in §904.403(c)). NOAA will consider a petition filed after a declaration or decree of forfeiture only if the petitioner demonstrates that he or she did not previously know of the seizure and was in such circumstances as prevented him or her from knowing of it, except that NOAA will not consider a petition filed more than three months from the date of such declaration or decree. (See §904.507 regarding the right of certain claimants to petition for restoration of proceeds from the sale of forfeited property.)

(2) The petition need not be in any particular form, but must set forth the following:

(i) A description of the property seized;

(ii) The date and place of the seizure;

(iii) The petitioner's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(iv) The facts and circumstances relied upon by the petitioner to justify the remission or mitigation;

(v) Any request for release under paragraph (f) of this section pending final decision on the petition, together with any offer of payment to protect the United States' interest that petitioner makes in return for the release, and the facts and circumstances relied upon by petitioner in the request;

(vi) The signature of the petitioner, his or her attorney, or other authorized agent; and

(vii) An express agreement to defer administrative or judicial forfeiture proceedings until completion of all other related judicial or administrative proceedings (including any associated civil penalty or permit sanction proceedings).

A false statement in a petition will subject petitioner to prosecution under 18 U.S.C. 1001.

(c) *Investigation.* NOAA will investigate the facts and circumstances shown by the petition and seizure, and may in this respect appoint an investigator to examine the facts and prepare a report of investigation.

(d) *Decision on petition.* (1) After investigation under paragraph (c) of this section, NOAA will decide the matter and notify the petitioner. NOAA may remit or mitigate the forfeiture, on such terms and conditions as under the applicable statute and the circumstances are deemed reasonable and just, upon a finding:

(i) That the forfeiture was incurred without willful negligence and without any intention on the part of petitioner to violate the applicable statute; or

(ii) That other circumstances exist that justify remission or mitigation of the forfeiture.

(2) Unless NOAA determines no valid purpose would be served, NOAA will condition a decision to remit or mitigate a forfeiture upon the petitioner's submitting an agreement, in a form satisfactory to NOAA, to hold the United States and its officers or agents harmless from any and all claims based on loss of or damage to the seized property or that might result from grant of remission or mitigation. If the petitioner is not the beneficial owner of the property, or if there are others with a proprietary interest in the property, NOAA may require the petitioner to submit such an agreement executed

by the beneficial owner or other interested party. NOAA may also require that the property be promptly exported from the United States.

(e) *Compliance with the decision.* A decision by NOAA to remit or mitigate the forfeiture upon stated conditions, as upon payment of a specified amount, will be effective for 60 days after the date of the decision. If the petitioner does not comply with the conditions within that period in the manner prescribed by the decision, or make arrangements satisfactory to NOAA for later compliance, the remission or mitigation will be void, and judicial or administrative forfeiture proceedings will be instituted or resumed.

(f) *Release of seized property pending decision.* (1) Upon request in the petition for relief from forfeiture, NOAA may in its discretion order the release, pending final decision on the petition, of all or part of the seized property upon payment by the petitioner of the full value of the property to be released or such lesser amount as NOAA deems sufficient to protect the interests served by the applicable statute. The following, however, will not be released:

(i) Property in which NOAA is not satisfied that the petitioner has a substantial interest;

(ii) Property whose entry into the commerce of the United States is prohibited;

(iii) Live animals, except in the interest of the animals' welfare;

(iv) Proceeds from the sale of seized property sold under § 904.506 (see § 904.507 regarding petitions for restoration of proceeds from the sale of property declared forfeited); or

(v) Property whose release appears to NOAA not to be in the best interest of the United States or serve the purposes of the applicable statute.

(2) If NOAA grants the request, the amount paid by the petitioner will be deposited in a NOAA suspense account. The amount so deposited will for all purposes be considered to represent the property seized and subject to forfeiture, and payment of the amount by petitioner constitutes a waiver by the petitioner of any claim arising from the seizure and custody of the property.

NOAA will maintain the money so deposited pending further order of NOAA, order of a court, or disposition by applicable administrative proceedings.

§ 904.507 Petition for restoration of proceeds.

(a) The general provisions of § 904.506 on petitions for remission or mitigation of forfeitures apply to petitions for restoration of proceeds from the sale of forfeited property, except as modified by this section.

(b) In addition to any evidence required under § 904.506, the petition for restoration of proceeds must be supported by satisfactory proof that the petitioner did not know of the seizure prior to the declaration or decree of forfeiture and was in such circumstances as prevented him or her from knowing of it.

(c) If forfeited property that is the subject of a claim for restoration of proceeds has been appropriated for official use, retention by the government will be regarded as sale for the purposes of this section.

(d) No petition for restoration of proceeds will be considered unless it is submitted within three months of the declaration or decree of forfeiture.

(e) If no petition is timely filed, or if the petition is denied, prior to depositing the proceeds NOAA may use the proceeds of sale to reimburse the government for any costs that by law may be recovered or to pay any reward that by law may be paid from such sums.

§ 904.508 Recovery of certain storage costs.

If any fish, wildlife, or evidentiary item is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 through 1543, any person whose act or omission was the basis for the seizure may be charged a reasonable fee for expenses to the United States connected with the transfer, board, handling or storage of such property. If any fish or wildlife is seized in connection with a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 through 3378, or any property is seized in connection with a violation of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 through 1882, any person convicted thereof, or as-

essed a civil penalty therefor, may be assessed a reasonable fee for expenses of the United States connected with the storage, care and maintenance of such property. Within a reasonable time after forfeiture, NOAA will send to such person by registered or certified mail, return receipt requested, a bill for such fee. The bill will contain an itemized statement of the applicable costs, and instructions on the time and manner of payment. Payment must be made in accordance with the bill. If the recipient of the bill objects to the reasonableness of the costs assessed he or she may, within 30 days of receipt, file written objections with NOAA at the address stated in the bill. NOAA will promptly review the written objections and within 30 days mail the final decision to the party who filed them. NOAA's decision will constitute final agency action on the matter.

§ 904.509 Abandonment.

(a) The owner of a seized item may abandon it to NOAA by various means, including, but not limited to, expressly waiving any claim to the item, refusing or otherwise avoiding delivery of mail concerning the seizure (as by giving a false name or address), or failing for more than 180 days to make or maintain a claim to the item.

(b) The owner of a seized item waives a claim to it by failing to respond within 120 days of issuance of a Government notice concerning the seizure, or by voluntarily relinquishing any interest in an item by written agreement, or otherwise.

(c) An item will be declared finally abandoned, without recourse, upon a finding of abandonment.

§ 904.510 Disposal of forfeited or abandoned items.

(a) *Delivery to Administrator.* Upon forfeiture of any fish, wildlife, parts or products thereof, or other property to the United States, or the abandonment or waiver of any claim to any such property, it will be delivered to NOAA for storage or disposal according to the provisions of this section.

(b) *Purposes of disposal.* Disposal procedures may be used to alleviate overcrowding of evidence storage facilities,

and to avoid the accumulation of seized items where disposal is not otherwise accomplished by court order, as well as to address the needs of governmental agencies and other institutions and organizations for such items for scientific, educational, and public display purposes. In no case will items be used for personal purposes, either by loan recipients or government personnel.

(c) *Disposal of evidence.* Items that are evidence may be disposed of only after authorization by the NOAA Office of General Counsel. Disposal approval usually will not be given until the case involving the evidence is closed, except that perishable items may be authorized for disposal sooner.

(d) *Loans.*—(1) *To institutions.* Items approved for disposal may be loaned to institutions or organizations requesting such items for scientific, educational, or public display purposes. Items will be loaned only after execution of a loan agreement which provides, among other things, that the loaned items will be used only for non-commercial scientific, educational, or public display purposes, and that they will remain the property of the United States government, which may demand their return at any time. Parties requesting the loan of an item must demonstrate the ability to provide adequate care and security for the item. Loans may be made to responsible agencies of foreign governments in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

(2) *To individuals.* Items generally will not be loaned to individuals not affiliated with an institution or organization unless it is clear that the items will be used in a noncommercial manner, and for scientific, educational, or public display purposes which are in the public interest.

(3) *Selection of loan recipients.* Recipients of items will be chosen so as to assure a wide distribution of the items throughout the scientific, educational, public display and museum communities. Other branches of NMFS, NOAA, the Department of Commerce, and other governmental agencies will have the right of first refusal of any item offered for disposal. The Administrator may solicit applications, by pub-

lication of a notice in the FEDERAL REGISTER, from qualified persons, institutions, and organizations who are interested in obtaining the property being offered. Such notice will contain a statement as to the availability of specific items for which transferees are being sought, and instructions on how and where to make application. Applications will be granted in the following order: Other offices of NMFS, NOAA, and the Department of Commerce; U.S. Fish and Wildlife Service; other Federal agencies; other governmental agencies; scientific, educational, or other public or private institutions; and private individuals.

(4) *Loan agreement.* Items will be transferred under a loan agreement executed by the Administrator and the borrower. Any attempt on the part of the borrower to retransfer an item, even to another institution for related purposes, will violate and invalidate the loan agreement, and entitle the United States to immediate repossession of the item, unless the prior approval of the Administrator has been obtained under §904.510(d)(5). Violation of the loan agreement may also subject the violator to the penalties provided by the laws governing possession and transfer of the item.

(5) *Temporary reloans; documents to accompany items.* Temporary reloans by the borrower to another qualified borrower (as for temporary exhibition) may be made if the Administrator is advised in advance by the borrowers. Temporary loans for more than thirty days must be approved in advance in writing by the Administrator. A copy of the original loan agreement, and a copy of the written approval for reloan, if any, must accompany the item whenever it is temporarily reloaned or is shipped or transported across state or international boundaries.

(e) *Destruction of items.* This paragraph and other provisions relating to the destruction of property apply to items:

- (1) Which have not been handicrafted, or
- (2) Which have been handicrafted and are of less than one hundred dollars (\$100) value, and
- (3) For which no acceptable applications have been received, or for which

publication in the FEDERAL REGISTER of the availability of similar items in the past has resulted in the receipt of no applications. Such items may be destroyed if they have been in government ownership for more than one year. Perishable items which are not fit for human consumption may be destroyed sooner, if the authorization required by §904.510(c) has been obtained. Destruction of items will be witnessed by two persons, one of whom may be the disposing officer.

(f) *Food items.* Food items will, if possible, be disposed of by gift to nonprofit groups providing public welfare food services.

(g) *Record-keeping.* A "fish and wildlife disposal" form will be completed each time an item is disposed of pursuant to the policy and procedure established herein, and will be retained in the case file for the item. These forms will be available to the public.

PART 905—USE IN ENFORCEMENT PROCEEDINGS OF INFORMATION COLLECTED BY VOLUNTARY FISHERY DATA COLLECTORS

Sec.

- 905.1 Scope.
- 905.2 Definitions.
- 905.3 Access to information.
- 905.4 Use of information.
- 905.5 Exceptions.

AUTHORITY: 16 U.S.C. 1853(f).

SOURCE: 60 FR 39251, Aug. 2, 1995, unless otherwise noted.

§905.1 Scope.

This part applies to the use, in enforcement proceedings conducted pursuant to the Magnuson Act, the MMPA, and the ESA, of information collected by voluntary fishery data collectors.

§905.2 Definitions.

When used in this part:

Consenting owner means the owner, operator, or crewmember of a vessel carrying a voluntary fishery data collector.

Enforcement proceeding means any judicial or administrative trial or hearing, initiated for the purpose of imposing any civil or criminal penalty authorized under the Magnuson Act,

MMPA, or ESA, including but not limited to, any proceeding initiated to: Impose a monetary penalty; modify, sanction, suspend or revoke a lease, license or permit; secure forfeiture of seized property; or incarcerate an individual.

ESA means the Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*, and implementing regulations.

Information means all observations, data, statistics, photographs, film, or recordings collected by a voluntary fishery data collector for conservation and management purposes, as defined by the Magnuson Act, MMPA, or ESA, while onboard the vessel of a consenting owner.

Magnuson Act means the Magnuson Fishery Conservation and Management Act, as amended, 16 U.S.C. 1801 *et seq.*, and implementing regulations.

MMPA means the Marine Mammal Protection Act, as amended, 16 U.S.C. 1361 *et seq.*, and implementing regulations.

Secretary means the Secretary of Commerce, the Secretary of the Interior, their chosen designees, or any other Federal agency authorized to enforce the provisions of the Magnuson Act, MMPA, or ESA.

Vessel means any vessel as defined at 16 U.S.C. 1802(31).

Voluntary fishery data collector means:

- (1) Any person, including an observer or a sea sampler;
- (2) Placed aboard a vessel by the Secretary;
- (3) For the purpose of collecting information; and
- (4) Whose presence aboard that vessel is not required by the Secretary pursuant to provisions of the Magnuson Act, MMPA, or ESA, or their implementing regulations.

§905.3 Access to information.

Information collected by a voluntary fishery data collector:

- (a) Is subject to disclosure to both the Secretary and the public, to the extent required or authorized by law; and
- (b) Is subject to discovery by any party to an enforcement proceeding, to the extent required or authorized by law.